(25,320)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 498.

THE DALTON ADDING MACHINE COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 28, 1916.

1 In the Supreme Court of Appeals of Virginia, at Richmond.

THE DALTON ADDING MACHINE COMPANY
v.
COMMONWEALTH.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, The Dalton Adding Machine Company, a corporation, respectfully represents that it is aggrieved by an order entered on the 21st day of July, 1915, by the State Corporation Commission of Virginia, in a certain matter pending before it, wherein the Commonwealth of Virginia, at the relation of the State Corporation Commission, was complainant, and your petitioner was defendant.

Your petitioner presents herewith a transcript of the record of said proceedings, from which it appears that the State Corporation Commission awarded a rule against your petitioner, dated March 23, 1915, and returnable at the court room of the State Corporation Commission in the Capitol Building of the City of Richmond, Virginia, on April 6, 1915, requiring it to show cause why it should not be fined under Section 1105 of the Code of Virginia, as amended, for transacting business in this State without first obtaining the certificate of authority as provided for by Section 1104 of the Code of Virginia, as amended; that your petitioner filed its answer to the charge that it had violated and was violating the statutes of Virginia; that on April 22, 1915, a hearing was had before the State Corporation Commission at Richmond, at which evidence was introduced on behalf of the Commonwealth of Virginia and

2 of your petitioner; and that on July 21, 1915, the State Corporation Commission rendered its decision in favor of the complainant and against your petitioner.

Your petitioner respectfully represents that the action of the State Corporation Commission was erroneous for the reasons which are set out at length in the answer of your petitioner, and which may be briefly stated as follows:

I. Your petitioner is a corporation of the State of Ohio, engaged therein in the manufacture and interstate sale of adding, listing and calculating machines, which it formerly manufactured at Poplar Bluff, Missouri, but since June, 1914, at Cincinnati, Ohio, and which it distributes through its salesmen to its customers, of whom there are many in the State of Virginia and other states.

II. Your petitioner has entered the State of Virginia solely for the purpose of its interstate commerce and has never done and is not now doing business in the State of Virginia within the meaning of the statutes of Virginia relating to foreign corporations.

III. Assuming that the statutes of Virginia relating to foreign corporations be construed to apply to any acts of your petitioner

on the ground that they constitute intrastate commerce, or on any other ground, such statutes are repugnant to the Constitution of the United States, and in particular to section 8, of article I thereof, to the Fifth Amendment, and to section 1 of the Fourteenth Amendment thereto, and are therefore invalid.

Wherefore, your petitioner prays that an appeal be granted to it from the order complained of, together with a supersedeas thereto; that the judgment of the State Corporation Commission be reversed for the reasons herein stated, and for such others as may be presented; and that such order may be entered by this court as may be right and proper.

And your petitioner will ever pray.

THE DALTON ADDING MACHINE CO.,
By THOMAS A. PANNING,
HAROLD S. BLOOMBERG,
Its Attorneys.

3 As counsel practicing in the Supreme Court of Appeals of Virginia, I certify that in my opinion the decision and order of the State Corporation Commission of Virginia complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals.

HAROLD S. BLOOMBERG.

Richmond, Virginia, September 11, 1915.

Received September 14th, 1915.

R. H. CARDWELL.

Appeal allowed. Bond $200.00, with surety as may be required by the State Corporation Commission, and said appeal will operate as a supersedeas also when the appellant, or someone for it, shall have executed the bond in such additional amount and with such surety as may be required by the State Corporation Commission.

R. H. CARDWELL,

Received September 14, 1915.

H. STEWART JONES, *C. C.*

4 VIRGINIA:

Proceedings before the State Corporation Commission, in the City of Richmond, the twenty-first day of July, 1915.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
v.
THE DALTON ADDING MACHINE COMPANY.

Rule.

Rule under Section 1105, Code of Virginia.

Be it remembered, that heretofore, to-wit, on the twenty-third day of March, 1915, a rule was awarded by the State Corporation Commission against The Dalton Adding Machine Company, in the words and figures following:

"It being suggested that The Dalton Adding Machine Company, a corporation chartered under the laws of some other jurisdiction than of the Commonwealth of Virginia, and designated as a foreign corporation, has been and is transacting business in this State without first obtaining the certificate of authority as provided for by section 1104 of the Code of Virginia, as amended, therefore a rule is awarded against the said corporation, returnable at the court room of the State Corporation Commission in the Capitol Building in the City of Richmond, Virginia, at ten o'clock A. M., on Tuesday, the sixth day of April, 1915, requiring it to show cause, if any it can, why it should not be fined under section 1105 of the Code of Virginia, as amended, in accordance with the statute in such case made and provided."

And thereupon certain proceedings were had as hereinafter set forth.

5 CITY OF RICHMOND, March 23rd, 1915.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
v.
THE DALTON ADDING MACHINE COMPANY.

Rule.

It being suggested that The Dalton Adding Machine Company, a corporation chartered under the laws of some other jurisdiction than of the Commonwealth of Virginia, and designated as a foreign corporation, has been and is transacting business in this State without first obtaining the certificate of authority as provided for by Section 1104 of the Code of Virginia, as amended, therefore a rule

is awarded against the said corporation, returnable at the court room of the State Corporation Commission in the Capitol Building in the City of Richmond, Virginia, at ten o'clock a. m., on Tuesday the sixth day of April, 1915, requiring it to show cause, if any it can, why it should not be fined under Section 1105 of the Code of Virginia, as amended, in accordance with the statute in such case made and provided.

CITY OF RICHMOND, April 6th, 1915.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
v.
THE DALTON ADDING MACHINE COMPANY.

Rule.

This day comes The Dalton Adding Machine Company, by counsel, and enters a limited appearance for the sole purpose of moving the commission to quash the writ, and the return thereon, in this matter.

And thereupon said, The Dalton Adding Machine Company, by counsel, moves that the said writ, and the return thereon, be quashed on the ground as it alleges that Harry C. Grubbs, on whom the said writ was served, was not at the time of such service,
6 and is not now, an officer, agent or employee of the said The Dalton Adding Machine Company, on whom process against said company may properly be served, which motion is continued by consent.

VIRGINIA:

Before the State Corporation Commission.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
v.
THE DALTON ADDING MACHINE COMPANY.

The Dalton Adding Machine Company, by counsel, enters a limited appearance for the sole purpose of moving the Commission to quash the writ, and the return thereon, in this matter, and moves that the said writ, and the return thereon, be quashed on the ground that Harry C. Grubbs, on whom the said writ was served, is not an officer, agent or employee of the said Dalton Adding Machine Company, on whom process against said company may properly be served.

HAROLD S. BLOOMBERG, *p. d.*

CITY OF RICHMOND, April 8th, 1915.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission

v.

THE DALTON ADDING MACHINE COMPANY.

Rule.

This day came the Commonwealth by the assistant attorney general, and The Dalton Adding Machine Company, by counsel, and thereupon The Dalton Adding Machine Company asked leave to withdraw its motion to quash the writ and the return thereon, which leave is granted. Thereupon The Dalton Adding Machine Company asked leave to file its answer to the rule, as it may be advised, on or before April 9th, 1915, which leave is also granted, and the proceeding is continued by consent.

7 CITY OF RICHMOND, April 14th, 1915.

Case No. 471.

The following order, which should have been entered on April 9th, 1915, is here entered nunc pro tunc:

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission

v.

THE DALTON ADDING MACHINE COMPANY.

Rule.

This day came the defendant company and filed its answer to the rule, to which the Commonwealth replied generally.

April 9, 1915.

State Corporation Commission, Virginia.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission

v.

THE DALTON ADDING MACHINE COMPANY.

The Answer of the Dalton Adding Machine Company to the Rule to Show Cause Entered against it by the Commonwealth of Virginia at the Relation of the State Corporation Commission.

This defendant, now and at all times hereafter, saving and reserving unto itself all and all manner of benefit, advantage and ex-

ception that may be had or taken to the many errors, insufficiencies and inaccuracies in the said rule contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it may be necessary to make answer unto, answering, says:

1. This defendant denies that it has been or is transacting business in the State of Virginia without right and lawful authority so to do, as hereinafter explained, although it admits that it has not obtained a certificate of authority as provided for by section 1104 of the Code of Virginia as amended, and, in explanation of its transactions complained of, this defendant refers to its statements hereinafter contained.

8 2. This defendant further answering says that it is a corporation originally organized and existing under and by virtue of the laws of the State of Missouri, with it office and principal place of business, until it removed therefrom, at Poplar Bluff, Missouri, and that prior to its removal it was a citizen and resident of the State of Missouri; that in the month of June, 1914, there was organized in the State of Ohio a corporation under the name and designation of The Dalton Adding Machine Company, with its office and principal place of business at Cincinnati, in the State of Ohio; that after the organization and incorporation of the said Ohio company, this defendant transferred all of its business, property and assets, real and personal, to the said Ohio corporation, and removed its business and machinery to the said City of Cincinnati, in the State of Ohio, where such business has been carried on ever since; but that no change or modification in its mode and manner of carrying on its business whatsoever was made at the time of the removal, as above explained, from Poplar Bluff, Missouri, to Cincinnati, Ohio.

3. This defendant further answering says that while still doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business and factory at Poplar Bluff, Missouri, and since the transfer and removal of its business to the City of Cincinnati, Ohio, with its office and place of business and factory at Cincinnati, Ohio, it is and was and for some years last past has been engaged in the business of manufacturing and selling a useful and valuable adding, listing and calculating machine; that it and its predecessors began the manufacture of such machines in a small way in the year 1902, and continued to manufacture and sell such machines to the present time; that, in the preparation for manufacturing and placing upon the market its adding, listing and calculating machines, it has, since entering upon the business, invested in experimental work, factory buildings and the construction, purchase and installation of special tools and machinery, more than one million dollars ($1,000,000.00); that it has grown and increased until it has on its factory pay rolls and in its organization force in the neighborhood of 300 or 400 employees; that it has, by its efforts, labors and expenditures of money, built up a large and growing demand for its adding, listing and calculating machines, until the purchasers and users of such machines are to be found in every state and territory of this country, and,

prior to the interruption occasioned by the European war, in
9 Austria, Belgium, Bulgaria, Canada, Denmark, France, Finland, Germany, Greece, Holland, Hawaiian Islands, Italy, Mexico, Sweden, Russia, and perhaps other countries; that among its users are practically all of the great firms, companies and corporations in the country, many of the principal cities of the country, including the City of Richmond, Virginia, more than fifteen hundred (1500) banks, and every department of the United States Government, which facts, this defendant states, show the value and utility and popularity of its adding, listing and calculating machines.

4. This defendant further answering says that, from the beginning of its business, it has been engaged in interstate commerce, and, as this defendant believes and alleges the fact to be, has engaged in no other way or manner of carrying on and conducting its business in any state outside of the state where its factory and principal office and place of business have been located; that in so carrying on and conducting its business, it has appointed salesmen and solicitors, as this defendant will term them herein, in the various States of the United States, who are merely "drummers" in common and popular language, and whose occupation is to "drum" up business and solicit orders for or proposals to purchase its adding, listing and calculating machines, and to that end this defendant has appointed a salesman or solicitor in the State of Virginia, to secure proposals or orders for its machines, as the result of his personal solicitation or the personal solicitation of those employed by him to assist him in securing orders; that the salesman or solicitor so appointed by this defendant is located at Richmond, Virginia; that he is not a clerk or employe of this defendant; is paid no salary or fixed compensation by this defendant; is not on its pay rolls, and is furnished no office or place of business by this defendant; that its salesman or solicitor in Virginia rents his own office and bears his own expenses, and pays the salary or commission and the expenses of the solicitors employed by him to assist him in soliciting orders or proposals for defendant's machines; that the compensation received by him is merely a commission on sales effected and collections made, and varies as they vary; that neither he nor those employed by him has any power to actually sell a machine or convey title thereto, and has not sold a machine or conveyed title thereto in any case or instance, but that his power and the power of those whom he employs is expressly limited to merely solic-
10 iting orders or proposals to purchase machines, which orders are taken on printed blanks or forms furnished him by this defendant, which forms contain and have always contained the words: "This order subject to approval of the Company," which orders amount only to an offer or proposition to purchase a machine on the part of the person, firm, company or corporation desiring to buy; that after such offers or proposals were signed by the party desiring to purchase a machine they were sent by the solicitor or salesman in Virginia to the home office of this defendant at Poplar Bluff, Missouri, and since its removal are sent by him to the home office of this defendant at Cincinnati, Ohio, for approval and acceptance; that this defendant considers the offers or proposals to purchase, and has ac-

cepted some and has rejected some sent to this defendant by its salesman or solicitor from Virginia, and other states, as this defendant has found the terms of payment, the responsibility of the purchaser, and similar matters, satisfactory or otherwise; that all checks and moneys were likewise forwarded to the home office of this defendant at Poplar Bluff before its removal, and are forwarded to the home office of this defendant at Cincinnati, Ohio, since its removal, and the commissions due to the salesman or solicitor in Virginia, as well as in other states, are paid by this defendant from time to time from its home office as collections are received; that in no case is any title vested in the prospective purchaser in or to the machine which he is proposing to buy, but the same remains the property of this defendant until this defendant has accepted the offer or proposal at its home office in a state other than Virginia, and received the money in full therefor.

5. This defendant further answering says that in conducting its business of soliciting and securing sales in Virginia, through its salesman or solicitor, as above explained, it has employed four forms of contracts: One where the party buys the machine and pays for the same outright; one where the party buys the machine and pays for the same in partial payments; one where the party rents the machine with the right to purchase the same within a given time; and one a combination form for use either for cash or installment orders; that said contracts are all in writing, and, respectively, read as follows: The names of the purchaser and salesman as here presented being the usual conventional names employed for illustration, and
11 the blanks for the place, amount, date, and similar matters being filled in to express the facts as they may be in each case, namely:

"Original.

$300. This order subject to approval of the Company.

Dalton Adding, Listing and Calculating Machines.

City, Richmond; County, Henrico; State, Virginia.

Date, October 1, 1912.

Dalton Adding Machine Company, Poplar Bluff, Missouri.

I hereby agree to purchase one Dalton Adding, Listing and Calculating Machine, Model Nine Ten Regular, (or as the fact may be), Serial No. 12114, and Satelite Stand. Price of same to be $300.

Above machine to be guaranteed for a period of two years from date of purchase against defects of material and workmanship. It is expressly understood that this written contract covers all agreements between the parties herein.

(Signed) JOHN DOE.

Salesman, Richard Roe.

All checks to be drawn to the order of Dalton Adding Machine Company."

"Original.

$300. This order subject to approval of the Company.

Dalton Adding, Listing and Calculating Machines.

City, Richmond; County, Henrico; State, Virginia.

Date, October 1, 1912.

In consideration of the purchase of one Dalton Adding and Listing Machine, Style Nine Ten Regular, (or as the case may be), Machine 12114, and Satelite Stand, I promise to pay to the order of the Dalton Adding Machine Co., Poplar Bluff, Mo., Three
12 Hundred Dollars ($300) as follows: twenty-five dollars ($25) per month for 12 months beginning with the month of the date hereof.

I hereby agree that the title to the above machine shall remain in the Dalton Adding Machine Company until payment therefor is made in full. In case of loss or damage by fire, I will remit the unpaid balance under this contract when due. The Dalton Adding Machine Company shall have the power to retake said machine at any time after default in payment, or failure on my part to keep any of the promises or agreements made herein, and such amount as has been paid shall apply as rent on said machine for the time it shall have been in my possession. In the event of my failure to make any payments as above, I will deliver the Dalton Adding and Listing Machine above described, to the Dalton Adding Machine Company immediately upon request.

Above machine to be guaranteed for a period of two years from date of purchase against defects of material and workmanship.

It is expressly understood that this written contract covers all agreements between the parties herein. You are authorized to make drafts for payments as they become due, together with interest, sending same to the First National Bank of Richmond for collection.

(Signed) JOHN DOE.

Salesman, Richard Roe.

All checks to be drawn to the order of Dalton Adding Machine Company."

"Rental Contract.

(To be executed in duplicate, one copy retained by the lessee and one copy sent to the Dalton Adding Machine Co., Poplar Bluff, Mo.)

Not effective unless approved by the Company.

Dalton Adding, Listing and Calculating Machines.

City, Richmond; County, Henrico; State, Virginia.
Street, No. 22 North Seventh Street.

Date, October 1, 1912.

13 To Dalton Adding Machine Company, Poplar Bluff, Missouri.

The receipt of the Dalton Adding, Listing and Calculating Machine number 12114 and Satelite stand is hereby acknowledged, for the use of which I agree to pay a rental of Ten Dollars ($10) per month for a period of six months, said rental to be payable at the office of the Dalton Adding Machine Company in Poplar Bluff, Missouri, on the first day of each and every month from the date hereof until paid.

The said Dalton Adding Machine is to be used in the above premises in Richmond, State of Virginia, and I further agree not to remove said machine from said premises without the written consent of the Dalton Adding Machine Company.

I further agree to become responsible for the safe keeping of the said machine and for any loss or damage done thereto, reasonable wear excepted, and to surrender the same to the Dalton Adding Machine Company on demand; (*a*) upon expiration of the above rental period; (*b*) upon default in payment of rentals when due, or the violation by the lessee of the terms of this agreement; or (*c*) in the event this shall not be approved by the said Dalton Adding Machine Company, as hereinafter provided.

I understand that the purchase price of a machine like the above is Three Hundred Dollars ($300), and if purchase is made within the above mentioned rental period, the amount paid as rental shall apply on the purchase price of the machine, but not otherwise.

It is further agreed that this instrument shall not become effective unless approved and accepted by the said Dalton Adding Machine Company at Poplar Bluff, Missouri. Notice of such approval and acceptance is hereby waived. This writing contains all of the agreements between the parties. I have retained a duplicate hereof.

(Signed) JOHN DOE.

Witness:
RICHARD ROE, *Salesman.*

All checks to be drawn to the order of Dalton Adding Machine Co."

14 "Original.

For Dalton Adding Machine Co.

No. —
Current —
Voltage —
Cycle —

City, Richmond; County, Henrico; State, Virginia.

Date April 1, 1915.

The Dalton Adding Machine Company, East Norwood, Cincinnati, Ohio:

Please enter my order for one Dalton Adding, Listing and Calculating Machine, Model Nine Ten, Serial Number 12114 and Satelite Stand, delivered to the undersigned at Richmond, Va., carrying charges prepaid, for which I agree to pay to the order of The Dalton Adding Machine Company at Cincinnati, Ohio, Three Hundred Dollars ($300) as follows: In cash or in monthly payments, as the case may be.

A discount of 5 per cent. shall be allowed on the net amount of this order for full cash payment within ten days from date of invoice.

Above Dalton Adding Machine to be guaranteed for a period of one year from date of purchase against defects of material and workmanship.

The conditions printed on the reverse side hereof constitute a part of this order.

An exact duplicate hereof has been retained by the undersigned.

(Signed) JOHN DOE.

Witness:
RICHARD ROE.

Solicitor: A. BLANK.

All checks to be drawn to the order of the Dalton Adding Machine Company.

And on the margin:

This Order Subject to Approval of the Dalton Adding Machine Company at its office in Cincinnati, Ohio.

Approved —— ——."

15 And on the reverse side:

"(1) The said Dalton Adding Machine equipment is to be covered by your written guaranty whereby you shall agree to make good any defects of material or workmanship for the period within stated.

(2) Title to the within described property shall remain in you until payment of the purchase price has been made in full, and the within signer hereby agrees not to remove the said property from the place of original delivery so long as any part of the purchase price remains unpaid, without first securing the written consent of the

Dalton Adding Machine Company. The within signer further agrees to assume the risk of loss and damage to said property.

(3) In case of failure to make any payment in time and manner as herein provided, the entire unpaid balance of the purchase price shall become immediately due and payable; and you may, without legal process, retake said property; and in such event the within signer hereby agrees to make delivery thereof to you immediately upon request.

(4) In event of your taking said property as above provided, any amount that may have been paid thereon shall be considered as payment for use, ordinary wear and depreciation of said property while in the possession of the within signer, and shall be retained by you. If the amount so paid does not cover the reasonable rental value of said property, the within signer hereby agrees to pay you on demand the balance of such reasonable rental. Nothing in this order shall be construed as obligating you to accept return of property tendered in lieu of purchase price agreed to be paid.

(5) All statutory provisions as to retaking and resale of the property within described are hereby expressly waived. If a claim hereunder is placed in an attorney's hands for collection, ten per cent. shall be added thereto and paid as attorney's fees.

(6) This order covers all agreements between the within signer and The Dalton Adding Machine Company, either express or implied; and when approved by said company at its executive office becomes a contract between the parties as purchaser and seller respectively. It is expressly agreed that this order shall not be countermanded."

Since the removal to Cincinnati, Ohio, as above explained, the above forms had the name "Cincinnati, Ohio," in place of the name Poplar Bluff, Missouri; that all orders or proposals as above,
16 signed by parties desiring to purchase or rent machines in Virginia, and sent to this defendant for approval and acceptance, as above explained, are and have been on forms or blanks as quoted above; that such orders or proposals are transmitted to this defendant through the Post Office by mail, and when signed by this defendant at its home office in a State other than Virginia, and not before, became effective and completed contracts, and contained the entire contract or agreement covering the transaction between this defendant and the purchaser in Virginia; that all the machines which have been sent to the State of Virginia for the purpose of being sold, or after an order for the same has been procured, as above or as hereinafter explained, have been sent by expressing or transmitting the same through the express company, constituting a common carrier; and that when a party who has tried or tested a machine already shipped by express into the State of Virginia to be sold, as above and as hereinafter explained, desires to purchase the particular machine which he has tried and has in his possession for the purpose of trial, the said machine is designated, in the order or proposal which he signs, by specific description, referring to it by its distinguishing style and serial number, so that his order or

proposal, sent through the mails to this defendant at its home office in a State other than Virginia, for consideration and acceptance, as above explained, and the contract, when accepted and signed by this defendant at its home office in a State other than Virginia, so as to become a completed and effective contract, segregates such particular machine from all others, and specifies and relates to it alone, and to no other machine whatsoever.

6. This defendant further answering, says that its factory is and always has been located either at Poplar Bluff, Missouri, or at Cincinnati, Ohio, and that all the machines sold to purchasers in Virginia or elsewhere are manufactured at its factory, and none in the State of Virginia; that owing to the nature of the machine, it is necessary for the salesman or solicitor, in effecting sales and in securing offers or proposals for the purchase of a machine, to be able to show the same to prospective purchasers, and in some cases allow them to try the same by installing them in their offices or place of business for a few days or a limited period, to determine their capacities, adaptation to the business carried on by the pros-
17 pective purchasers, superiority over machines of other makes, and matters of that kind; that to enable its salesman or solicitor to secure orders or proposals for its machines and to effect a sale of the same in the way above explained, it is necessary for this defendant to ship machines into the State of Virginia, to allow them to be exhibited and in some cases tried or tested by prospective purchasers; that all of the machines that have been shipped by this defendant into the State of Virginia, and so exhibited and tried or tested there, were shipped to Virginia for the purpose of effecting a sale of the same, and for no other purpose; that after a prospective purchaser has signed an order or proposal to buy a machine, and the same has been sent by the salesman or solicitor to the home office of this defendant, at Poplar Bluff, Missouri, or Cincinnati, Ohio, and has been accepted by this defendant, a machine to fill such order is supplied to the purchaser in one of two ways: first, by shipping a machine direct from the factory located in a State other than Virginia, to fill the order; or, second, by allowing the purchaser to retain the machine which he had tested or tried, and with which he had become familiar, in which case another machine is shipped from the factory to the salesman or solicitor to take the place of the machine which he had placed on trial, and which the purchaser, from having become familiar with the same, preferred or desired to keep; that whether the purchaser is supplied with a machine in the one way or the other, there has been in every case an actual shipment of a machine from the home office of this defendant, located in a State other than Virginia, either to supply the purchaser whose order or proposal had been already accepted by this defendant, or to be sold by exhibiting the same, and allowing the party becoming interested in the same to try or test it, if so desired, before signing an order or proposal to determine its adaptability and value to him in his particular business; that in the majority of cases the machine so shipped from the factory of this defendant is shipped to fill orders or pro-

posals already secured and accepted before the shipment is made, although in a number of cases, particularly during the first year that the solicitor or salesman in Virginia procured orders or proposals, perhaps in three out of ten cases, the purchaser has been allowed to retain the machine already shipped into Virginia for the purpose of sale, and which he had tried and tested before signing an order or proposal for the purchase of the same, but that in each and every case there is and has been a shipment of a machine into
18 Virginia from the factory of this defendant, located in a State other than Virginia, the only difference being that in some cases the shipment is made for the purpose of a sale and in anticipation of a sale, while in the remaining cases the shipment is made after the order or proposal to purchase has been secured by the salesman or solicitor, and transmitted to the home office of this defendant, and accepted by it, but that in every case, whether the machine was shipped before or after the sale, it has been sold and only sold by a written contract signed by this defendant, as the seller in a State other than Virginia, and by the purchaser in Virginia.

7. This defendant further answering, alleges and states the fact to be that the purpose, nature and object of the shipment of a machine into Virginia from the home office of this defendant, located in a State other than Virginia, before an order or proposal has been received for the same, is for the purpose of effecting a sale thereof, and that the shipment, the solicitation by the salesman, the testing or trying of the machine before the signing of the order or proposal to buy the same, are all merely incidents or steps leading up to the final consummation of the sale, which, when completed, constitutes, as this defendant believes and insists, a transaction of interstate commerce, of which the initiation of the transaction by shipment and the successive steps by solicitation, testing or trying, and signing a proposal or offer to buy, are all necessary, legitimate, and component ingredients of parts of the completed transaction, which includes all the initiatory and intervening acts, instrumentalities and dealings that bring about the consummated sales; that the transaction is, in reality and in fact, a transaction between this defendant and the purchaser, negotiating and dealing from different States—Missouri or Ohio and Virginia in this case—in which the salesman or solicitor merely forms a link, convenience or instrumentality; and that the transaction, as a commercial entity, included this defendant on the one hand in Missouri or Ohio, and the purchaser on the other hand in Virginia, each dealing from its or his respective place of business, the one in Missouri or Ohio and the other in Virginia, the same in principle and in reality as if the transaction were conducted by correspondence, and without any personal intermediary link or instrumentality, represented by the salesman or solicitor, so that the completed transaction constitutes an interstate contract,
19 transaction or dealing, irrespective of whether the machine was shipped from Missouri or Ohio to Virginia, before or after the contract was signed or executed.

8. This defendant further answering, says that the adding, listing

or calculating machines manufactured by this defendant, at Poplar Bluff, Missouri, or Cincinnati, Ohio, are entirely finished and completed in every respect at its factory, and are then enclosed in a box or case to preserve their delicate mechanisms from breakage or injury while being transported or shipped; that they are received in the State of Virginia by the salesman or solicitor in the original box or package in which they are shipped, and are delivered to the purchaser when shipped to fill an order or proposal that had been already received and accepted by this defendant in the original box or case in which they were shipped; and in those cases where they have been shipped before an order or proposal has been received and accepted by this defendant, they are, in some cases, sold and delivered to the purchaser, when secured, in the original box or case in which they were shipped; and in other cases, where the prospective purchaser desired to test or try the same, they are removed from the original box or case for the purpose of such test or trial, but for no other purpose; that no change, addition, subtraction or modification of any kind is made in the machine after it is shipped to Virginia, but where the party testing or trying the same desires to make a purchase, and signs an order or proposal which has been forwarded to the home office of this defendant in Missouri or Ohio, and accepted, the machine is delivered to the purchaser in exactly the same state and condition, in every respect, that it was in when shipped from the factory in Missouri or Ohio; and that, in reality and in fact, the sale, when effected and consummated, by the signing of an order or proposal by the prospective purchaser in Virginia, and the approval and acceptance of the order or proposal by this defendant in Missouri or Ohio, is the same to all intents and purposes as a sale of the machine in the original box or case, inasmuch as no addition or change whatsoever to or in it has been made, and the object of removing it from the box or case was merely for the purpose of exhibiting it and enabling it to be tried and tested by the party interested, to see whether it was adapted to the purposes and requirements of his business.

20 9. This defendant further answering alleges and represents that it has the right, under the Constitution of the United States, to carry on interstate commerce business or transactions within the State of Virginia, as it has been doing, and to use or employ any convenient instrumentalities and methods in doing so, and that, in so carrying on its interstate business, as above explained it is not doing business in the State of Virginia, in the sense or manner prohibited by section 1104 of the Code of Virginia as amended, but has merely been carrying on an interstate commerce business, authorized, justified and protected by the commerce clause of the Constitution of the United States, and especially by the third clause of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian tribes," as this defendant is advised and believes, and the protection of which clause of the Constitution it claims and invokes.

10. This defendant, having fully answered the rule entered against

it to show cause, prays to be hence dismissed without day; as it will ever pray.

THE DALTON ADDING MACHINE CO.,
By B. C. HARRISON, *Secretary.*

[Seal Dalton Adding Machine Company, Incorporated, 1914.]

HAROLD S. BLOOMBERG,
Solicitor for Defendant.
THOMAS A. BANNING,
Of Counsel.

STATE OF OHIO,
County of Hamilton, ss:

B. C. Harrison, secretary of The Dalton Adding Machine Company, being duly sworn, on oath deposes and says: That he has read the foregoing answer of The Dalton Adding Machine Company, and knows the contents thereof, and that the same is true as to all matters of fact therein stated, and that he believes it to be true as to all matters stated on information and belief.

B. C. HARRISON.

21 Subscribed and sworn to before me this 2nd day of April, 1915.

[SEAL.] HARRY E. ANTRIM,
Notary Public.

My commission expires February 14, 1917.

CITY OF RICHMOND, April 22nd, 1915.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
v.
THE DALTON ADDING MACHINE COMPANY.

Rule.

This day came again the parties, by their attorneys, and the evidence having been submitted and the argument of counsel fully heard, the Commission takes time to consider of its judgment and the order to be entered in this proceeding.

Before the State Corporation Commission of Virginia.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission

v.

THE DALTON ADDING MACHINE COMPANY.

Rule under Section 1105, Code of Virginia.

April 22, 1915.

Present: Harold S. Bloomberg, Esq., for The Dalton Adding Machine Company; Thomas A. Banning, Esq., for The Dalton Adding Machine Company; Christopher B. Garnett, Esq., assistant attorney-general, for State of Virginia.

Mr. Garnett: If your honors please, I suppose it will be proper to read the pleadings first. This is a rule against The Dalton Adding Machine Company to show cause why it should not be fined for not complying with the provisions of the Code of Virginia re-
22 quiring foreign corporations to perform certain duties before doing business in——

The Chairman: The rule speaks for itself, and if there is any answer, now is the time to file it.

Mr. Bloomberg: If your honors please, before reading the answer, I would like to call attention to the fact that the rule in this case against The Dalton Adding Machine Company is for doing business in Virginia without taking out the proper authority. The trial was had under a penal statute, which imposes a penalty upon the defendant for each separate offense, making each transaction a distinct offense. We therefore think, under the circumstances, that we are entitled to have the issues specified, and to know just upon what transactions the defendant is being tried, to know the nature of the transaction involved. The Commission will recall, from the pleadings heretofore had in a case involving somewhat the question involved here, that reference was made to the sales of machines under certain circumstances. Reference was also made to the sales of ribbons and paper and reference was also made to repairs. Now at the present time we are in the dark as to just what the exact issue is, and, therefore, submit this motion for a specification of the issues directly involved in this trial. In doing that, we do it not for the purpose of delay, for we are prepared to go ahead, but for the reason that if the issues can be narrowed down to the specific question involved, which one of the transactions are involved in this trial, we believe it would narrow the taking of evidence to the question in dispute.

Mr. Garnett: If your honors please, there has been a stipulation between counsel already made, by which it was agreed that certain portions of the record made in the prior proceeding should be read in this proceeding, reciting that the affidavits of Harry C. Grubbs, James L. Dalton, Robert R. Prentis, Richard T. Wilson, James H.

Lawder, James L. Dalton and Harry C. Grubbs may be used and treated as evidence here, and, "It is further stipulated and agreed that in addition to the affidavits above mentioned, each of the parties hereto reserves the right and privilege of offering such other or further testimony as such party may desire or be advised. Now these stipulations bring before the court certain transactions. Now if any of them constitute doing business in Virginia, that is the sole issue, absolutely the sole issue. The issue is made here,
23 and my friends have been informed, so far as they can be informed, of the nature of what we expect to prove; but I do not see how we can have any making of issues at bar, except the trial of the cause, which simply consists of the question whether they have been doing business in Virginia or not. It is to be presumed that they are willing to have those transactions submitted before this body, and that simple issue has already been specifically made up, without any formal specification as to what it is to be limited to.

Mr. Bloomberg: If your honors please, in reply to the attorney-general, there are two or three different questions involved in this case. It may be that the Commission will determine that there has been a violation of the law in one respect, and that the acts of the defendant in the other two respects are within the law, or vice versa, and the decision of the Commission imposing a fine would, therefore, not cover any special issue, but cover the entire transaction. Now it is the intention and desire of this company to abide by the laws of Virginia and conduct its business in such a way as to conform with the requirements of the laws of Virginia, but a decision against the company, against the defendant, without an express determination of which of the issues are involved, would cover the entire acts done and not be narrowed down to show which acts of the company are in accordance with the laws of the State.

The Chairman: Suppose the Commission hears the testimony first. How can the Commission determine wherein you have violated the law and wherein you have not violated it before hearing the testimony? I have forgotten about this case. I suppose it is just the same as if the Commission had simply issued a rule against you that you had violated the law of the State, upon information received. We will hear the testimony and determine whether you have violated the law or not, and wherein you have violated it and wherein you have not violated it.

Mr. Bloomberg: At the same time, I would submit that under the statute making each separate transaction a different offense, there should be a specification of the issues as to the transactions involved, so that we may know before going into the trial which transaction we are being tried on.

24 The Chairman: If we could conceive that the defendant was put at any disadvantage, we would require an amplification of the rule, but we cannot now see that it will be. The Commission is charged under the general statute with seeing that the foreign corporations do not violate this law. This is an investigation under the general law to ascertain if you have violated the law. When the evidence is in, there may be some parts of it that are

immaterial, and they will be excluded and not considered. You have not been indicted by a grand jury as for a misdeamer, and while the proceeding partakes of a criminal nature, is still, nevertheless, is a civil proceeding to ascertain whether you have done business in Virginia in violation of the State law. Until we hear the evidence, we do not know whether you have or not. We think it unnecessary at this stage to define the issue any more clearly than it has been defined. You are charged with transacting business in this State without having obtained the authority required by the State statute.

Mr. Bloomberg then read and filed the answer of The Dalton Adding Machine Company.

The Chairman: Is it the Ohio corporation that is answering here, or the Missouri corporation?

Mr. Bloomberg: The Missouri corporation sold out to the Ohio corporation.

The Chairman: Which one sells machines here?

Mr. Bloomberg: The Ohio corporation.

The Chairman: Is that the corporation that is answering here?

Mr. Bloomberg: Yes, that is the only corporation at the present time, the other having passed out of existence and gone out of business at the time of its transfer to the Ohio corporation.

Mr. Garnett then read the stipulations agreed on between counsel, which appear at the end of the testimony.

Mr. Garnett: This case can be expedited if we treat the affidavits as in; but, if my friends think it proper to bring them again to the Commission's attention, they may be read now.

Mr. Banning: If your honors please, these affidavits, I may say, are consonant with the allegations of the answer, they are confirmatory or substantiative of the answer, so I see no reason why the proceeding suggested should not be followed.

Mr. Garnett: If your honors please, in the matter of the further taking of evidence, I have had Mr. Grubbs summoned without previous conference with him at all, in order to prove the relation between him and the defendant company, and will ask for Mr. Grubbs to be sworn.

The Chairman: Is it proposed to tender the charter of the company? Have you a copy of the charter of your company?

Mr. Banning: Not here, your honor. It is a recognized foreign corporation, and I did not therefore think it necessary to produce the charter of the company. We admit in our answer that we are a corporation, formerly of Missouri and now of Ohio.

The Chairman: We think it an essential part of the case.

Mr. Banning: Of course it will be understood, then, that we will furnish it immediately on our being able to get it here.

H. C. GRUBBS was duly sworn, and testified as follows:

By Mr. Garnett:

Q. Mr. Grubbs, what is your name, age, residence and occupation?

A. H. C. Grubbs, age 29, residence 2703 Stuart Avenue, Rich-

mond, occupation solicitor of sales for the Dalton Adding Machine Company.

Q. How long have you occupied the position of solicitor of sales?

A. In Virginia, since February, 1912.

Q. Was that when this company commenced to do business in Virginia, or subsequent to that time?

26 A. To my knowledge that was when they began doing business here.

Q. Did you have a written contract with the company at that time?

A. I did not.

Q. How was your contract made, and with whom?

A. The contract was made verbally with Mr. Dalton, president of the Dalton Adding Machine Company.

Q. Was no record made of the contract?

A. No, sir.

Q. Where were you when you made the contract?

A. In the office of the Dalton Adding Machine Company in Poplar Bluff, Missouri.

Q. Has no written record been made of any contract between you and that company since that time?

A. No, sir.

Q. You mean to say, then, that you are solicitor of sales in this territory for the Dalton Adding Machine Company, without any record of any contract whatever?

A. Yes.

Q. Have you any correspondence with the officers of the company which refers to your contract?

A. No, I haven't any contract nor any correspondence referring to it.

Q. Who, besides yourself and Mr. Dalton, are acquainted with the terms of that contract?

A. I don't know that any one is. There wasn't anyone present when we made the contract.

Q. What is your territory?

A. The State of Virginia.

Q. How do you transact business in this State?

A. I solicit orders or proposals, and when I find a party who is willing to buy one of our machines, I have him sent one of the forms as shown in this answer.

Q. Are you the only solicitor for the State of Virginia?

A. I have one solicitor, who is under my direction, soliciting in the same manner as I solicit.

Q. Where is your place of business?

A. 22 North Seventh Street.

Q. How long have you been maintaining that place of business?

A. Since the 1st of February, 1912.

Q. What office force have you?

27 A. I have just a stenographer, that's all.

Q. What books do you keep?

A. A ledger containing my commission account with the company.

Q. Is that all?
A. And a commission account with the solicitor who assists me.
Q. What is the name of the solicitor who assists you?
A. At the present time W. K. Dau is assisting me.
Q. Where is his office?
A. He has no office; he works out of my office.
Q. What territory do you personally cover?
A. I cover all parts of my territory, in Virginia, no prescribed portion of it.
Q. You practically, then, cover the whole of Virginia, do you?
A. Yes, sir.
Q. What portion of it does Mr. Dau cover?
A. He covers any portion where I deem it necessary to send him; no prescribed portion for Mr. Dau.
Q. Have you an office at any other place in Virginia than Richmond?
A. No, sir.
Q. Tell the Commission what you keep in your office in the way of supplies and furniture.
A. I keep adding machines and the stands that they are placed upon, and a small supply of ribbons and paper and a few parts for repairs.
Q. Who has the title to this property which you have enumerated?
A. The Dalton Adding Machine Company.
Q. The title to that property stands not in your name, but in the Dalton Adding Machine Company?
A. Yes, sir.
Q. When these goods—the machines, the stands, the parts and the supplies—are shipped to you, what bookkeeping do you do, if any, to show the relation between you and the company in regard thereto?
A. I have a form which we term "Receipt from the Factory Report," a form on which I report the receipt of any machines or supplies.
Q. Do you keep a copy of that in your office and send a copy to the home office?
28 A. I do.
Q. Are you charged with these on the books of the company?
A. No, sir.
Q. Suppose they are injured while in your possession, who is responsible for their injury?
A. The company.
Q. Suppose that they are stolen from your office, who is responsible for the loss?
A. That question has never been taken up, so I am unable to answer.
Q. There is no express contract, therefore, in regard to that point?
A. No, sir.

Q. But if they are injured, there is an express contract that the company is responsible?

A. When they are injured in shipment, they are responsible to the extent that they would make any repairs that are necessary. If a machine is damaged in transit—I judge that is what you mean to convey—if a machine were damaged in transit, they would repair it.

Q. Suppose it was damaged in your office?

A. They would repair it, undoubtedly, although there is no understanding about that.

Q. Now, Mr. Grubbs, there are four contracts which are possible between the company and the purchaser or renter of these machines, are there not?

A. Yes, sir.

Q. In other words, you are authorized to dispose of these machines in four ways, as set up in the answer?

A. Not at present. The two first forms have been discontinued.

Q. The first two forms set out in the answer have been discontinued?

A. As I understand. That is, the cash contract and the time contract have been discontinued, and the new combination contract substituted in their place.

Q. That leaves, of the four set out in the answer, only two ways of now doing business?

A. Two forms we use, with an occasional purchaser having its own forms, such as railroads and other purchasers having their own forms and will not sign any other forms.

Q. I understand that you usually use these forms, but when you sell to railroads they supply you with forms themselves?

29 A. Railroads and some corporations, and some municipal officers have their own purchase forms which they issue with requistions ordering material. These forms are treated in the same way as our regular contracts.

Q. But they supersede these forms that are set out here, is that right?

A. Yes.

Q. Have you got any copies of those forms?

A. I have.

Q. Will you furnish them to the Commission?

A. Yes, sir.

Mr. Bloomberg: I have them all.

Mr. Garnett: If you have them here, I would like to see them.

The Chairman: Do you still use the rental contract?

Witness: Yes, sir.

By Mr. Garnett:

Q. You have furnished me with the original order, it appears to be, of the Norfolk & Western Railway Company, for a Dalton Adding Machine and stand. I note, in this order, that there is this express provision therein:

"Ship by express.

If from Richmond, Va., via Southern Express. If from Poplar Bluff, Mo., via U. S. Express—c% Southern Express at either Cincinnati or Columbus, Ohio.

Ship Promptly."

Q. Do you know whether, on this order, the goods were shipped from Richmond or Poplar Bluff.

A. I can tell you from looking at the order. (Examines.) They were shipped from Poplar Bluff.

(NOTE.—This order is copied later in this record, when filed as Exhibit No. 4 in response to call.)

Q. Is there any reason why they should not have been shipped from Richmond?

A. There was no machine of that kind on trial. Where we have no machine on trial, we ship direct from the factory. Where a machine had to be delivered, it would be delivered direct from the
30 factory to the purchaser.

Q. If that machine or a similar machine, had been in Richmond, you would have shipped it from Richmond, would you not?

A. No, sir.

Q. Why not?

A. The shipment had to be made, and it is the rule of the company that where a shipment has to be made, to make it from the factory.

Q. Haven't you got in Virginia, and in Richmond, at this time, all kinds of machines that are manufactured by you which have not yet been sold to any purchaser?

A. Not all kinds, no, sir.

Q. How many kinds of machines do you manufacture?

A. Well, I am not positive, but I think possibly about thirty different models.

Q. How many models do you keep in your place of business here?

Commissioner Rhea: Do I understand that these are adding machines?

Mr. Garnett: Yes, sir.

A. I have three different—four different models in my office at the present time.

By Mr. Garnett:

Q. If an order is received from Roanoke, or any city in Virginia, and you have on hand stock to fill that order in this city, do you make shipment from Richmond?

A. No. I have it shipped from the factory.

Q. You have to ship from the factory?

A. I have it shipped from the factory.

Q. If an order is received in Richmond, and you have that machine on hand, you deliver it from your office, do you not?

A. That depends on the pleasure of the customer. Ordinarily, when a machine is on trial, or in some cases when a machine is on trial, and the customer prefers to keep the machine he has had on

trial, we let him keep it; otherwise, we ship a machine to fill his order.

Q. How many machines of all kinds have you on hand and unsold in the State of Virginia?

A. I can't give you a positive statement. I can furnish you that.

31 Q. Approximately?

A. I would say thirty.

Q. Now on hand and unsold?

A. Yes, in the entire State of Virginia—not in Richmond, though.

Q. You expect to sell those machines in Virginia, do you not?

A. They were shipped here for that purpose, and I presume that I will.

Q. Your past experience leads you to believe that you will sell them in Virginia?

A. Yes.

Q. Now, coming to the specific contracts that you now use——

Commissioner Rhea: Right there, just a minute. Did he say he had thirty different models in his office?

Mr. Garnett: Four.

Mr. Banning: And about thirty others scattered through the State.

Commissioner Rhea: Suppose a party in Roanoke, or Bristol, wants to get one of your machines, how does he let you know which one of the models he wants?

Witness: I have to deal with him personally and let him see the different models, and he selects what he wants.

Commissioner Rhea: Suppose he lives in Bristol, would he have to come to Richmond?

Witness: No, we go to him.

Commissioner Rhea: Do you take your machines to him?

Witness: We have one sample aluminum machine in a leather case; we show him that model and the difference between that and the other models that we can supply him.

Commissioner Rhea: And he selects from that sample?

Witness: Yes, sir.

32 Commissioner Rhea: After your demonstration?

Witness: Yes, sir.

By Mr. Garnett:

Q. I show you here a form of original and duplicate contract which you furnished me, and ask you to file it with your testimony as "Exhibit H. C. Grubbs No. 1."

Said exhibit reads as follows:

Original.

For Dalton Adding Machine Co.

No. —.
Current —.
Voltage —.
Cycle —.

City ——, County——, State——.

The Dalton Adding Machine Company, East Norwood, Cincinnati, Ohio:

my

Please enter our order for — Dalton Adding, listing and Calculating Machine, Model ——, Serial Number —— and Stand—— Delivered to the undersigned at ——, carrying charges prepaid, for

I

which we agree to pay to the order of The Dalton Adding Machine Company at Cincinnati, Ohio,—— Dollars. ($—) as follows:

List price of Equipment must appear here.

A discount of 5 per cent shall be allowed on the net amount of this order for full cash payment within ten days from date of invoice.

Above Dalton Adding Machine to be guaranteed for a period of one year from date of purchase against defects of material and workmanship.

The conditions printed on the reverse side hereof constitute a part of this order.

An exact duplicate hereof has been retained by the undersigned.

(Signed) —— ——,

By —— ——.

Witness —— ——.
Solicitor —— ——.

33 This Order Subject to Approval of The Dalton Adding Machine Company at its office in Cincinnati, Ohio.

Approved — ——.

All checks to be drawn to order of The Dalton Adding Machine Company.

(*Conditions on Back.*)

(1) The said Dalton Adding Machine equipment is to be covered by your written guaranty whereby you shall agree to make good any defects of material or workmanship for the period within stated.

(2) Title to the within described property shall remain in you until payment of the purchase price has been made in full, and the within signer hereby agrees not to remove the said property from the place of original delivery so long as any part of the purchase price remains unpaid, without first securing the written consent of

The Dalton Adding Machine Company. The within signer further agrees to assume the risk of loss and damage to said property.

(3) In case of failure to make any payment in time and manner as herein provided, the entire unpaid balance of the purchase price shall become immediately due and payable, and you may, without legal process, retake said property; and in such event the within signer hereby agrees to make delivery thereof to you immediately upon request.

(4) In event of you retaking said property as above provided, any amount that may have been paid thereon shall be considered as payment for use, ordinary wear and depreciation of said property while in the possession of the within signer, and shall be retained by you. If the amount so paid does not cover the reasonable rental value of said property, the within signer hereby agrees to pay you on demand the balance of such reasonable rental. Nothing in this order shall be construed as obligating you to accept return of property tendered in lieu of purchase price agreed to be paid.

(5) All statutory provisions as to retaking and recall of the property within described are hereby expressly waived. If a claim hereunder is placed in an attorney's hands for collection, ten per cent shall be added thereto and paid as attorney's fees.

(6) This order covers all agreements between the within signer and The Dalton Adding Machine Company, either express
34 or implied; and when approved by said company at its executive office becomes a contract between the parties as purchaser and seller, respectively. It is expressly agreed that this order shall not be countermanded.

(Original and Duplicate Order Blanks are identical except color of paper, original being printed on white paper and the duplicate on blue paper.)

Q. Is this contract still used by your company?

A. Yes, sir.

Q. This contract purports to order a machine, and provides for the method of payment, and makes a provision for a discount of five per cent; and at the end of the contract, "This order subject to approval of the Dalton Adding Machine Company at its office in Cincinnati, Ohio;" then, Approved —." When a prospective purchaser has a machine on trial, I understand you may sell it to him in this way, namely, you will give him the right to fill in this contract and retain that same machine, is that correct?

A. That is right.

Q. Now when he pays you cash, after trial, for the machine, have you ever had a case where the company disapproved that cash transaction?

A. I have on file here some cases where the order has been rejected; I don't recall whether any of them were cash transactions or not.

Q. At your leisure I would like you to find from your file whether that is true.

Commissioner Rhea: Right there; if the company did object after you got cash for a machine, why would they object?

Witness: The price might not be as stipulated by them. For instance, if I sold a $300 machine for $250 and sent them a check for $250, they would send it back.

Commissioner Rhea: If you got $300, there would be no ground for it?

Witness: No ground for it.

Commissioner Rhea: Do I understand that you may or may not have sold one for $250?

35 Witness: No, I have not done so.

By Mr. Garnett:

Q. Have you any recollection now of a case, without consulting your files, where you sold a machine for cash for the listed price, and the company rejected the sale afterwards?

A. No.

Q. Would the approval of the company to such a transaction as that be afterwards communicated to the purchaser?

A. Yes.

Q. Would the approval of the rental contract which you have filed in your answer and given a copy of here, be communicated to the purchaser?

A. Yes, sir.

Q. In what form?

A. They write a letter acknowledging the contract and inclosing an invoice.

Q. Why is it, then, that the rental contract contained this provision, "Notice of such approval and acceptance is hereby waived?"

A. I don't know why it contained that provision.

Q. I show you here what purports to be a duplicate of the contract between Davis Bottom, superintendent of public printing of Virginia, and your company, by which he agrees, as superintendent of public printing, to purchase at $200 one of your machines on terms as follows: "$25.00 rental paid on Dalton machine No. 17595 to be deducted, the balance less 5 per cent for cash." That contract purports to have on its edge the same provision, namely, that it is subject to the approval of the Dalton Adding Machine Company at its office in Poplar Bluff, Missouri, and it has a space there where it is to be approved. It does not purport ever to have been approved on this duplicate contract, does it?

A. It was approved on the original, not on the duplicate.

Q. Was the original returned to the superintendent of public printing?

A. No, sir.

Q. Then the approval provided for by that contract simply remains in the files of the company?

A. Yes.

Q. Now, if that had been a cash transaction, or if the machine had remained in the office of the purchaser, would there have been any occasion for the approval of it to be afterwards communicated to the purchaser?

36 A. It would have. I don't know whether there would ever be any occasion for it, or not, but it would be done.

Q. It would be communicated?

A. Yes, sir.

Commissioner Rhea: Let me see if I understand. This contract was made by the superintendent of public printing for the purchase of one of the machines; he paid $25 in cash, and then is to have 5 per cent off of the remainder for cash?

Witness: Yes, sir.

Commissioner Rhea: He made that contract with you, that he would have five per cent for cash?

Witness: That is in the sales contract. Five per cent discount is allowed on any bill paid within ten days from date of invoice.

By Mr. Garnett:

Q. The point I want to get at is this. If you have received cash for a machine that you have delivered, and the contract itself provides for approval, why don't you provide for your approval on the form that is furnished to the customer?

A. The approval is—the form which is furnished to the customer is a duplicate of the contract, which he retains; it is never sent to the Dalton Adding Machine Company. The original is sent to the Dalton Adding Machine Company and approved there, and the purchaser advised of the approval.

Q. Then, as I understand, you never send the duplicate contract to the company for approval?

A. No.

Q. And a cash transaction may receive approval in writing or not?

A. It will receive approval by writing, but it is approved in every case.

Q. If it is a cash transaction, why should it be necessary that the approval be in writing?

A. In order for the purchaser to receive title to the machine, which I am not authorized to deliver to him.

Q. In case of a rental contract, how does your company indicate its approval?

A. They acknowledge receipt of the contract, and send the lessee an invoice covering the amount stipulated in the contract;
37 they simply acknowledge receipt of it; they say, "Contract received and accepted and invoice enclosed."

Q. But, in spite of that fact, there is a provision in the rental contract by which the lessee specifically waives notice and acceptance and approval by the company, is there not?

A. It is, yes.

Q. Are these rental contracts generally sent after the machine is in the purchaser's office, or place of business?

A. There is no general rule for that, they are not always.

Q. But it does often happen?

A. It does ocasionally.

Q. Have you ever had a case where the rental contract was disapproved which you had made in the city of Richmond?

A. I am not positive, but I think so.

Q. Will you endeavor to find a sample of that also?

A. Yes.

Q. Now, Mr. Grubbs, what is the extent of the business done by you in the State of Virginia, in a year?

A. You mean the amount of gross sales?

Q. Gross sales, yes, sir.

A. Approximately seventeen or eighteen thousand dollars, in the neighborhood of $18,000.

Q. Have you got a printed form of instructions to agents?

A. No, sir.

Q. Have you got a catalogue of machines and parts?

A. I have a catalogue of machines, but not of parts.

Q. Are those catalogues available to the Commission?

A. Yes.

Q. Will you furnish them with a copy?

A. I will.

Q. Exactly how many machines have you in your office now?

A. I don't know exactly.

Q. About how many?

A. I would say less than half a dozen, possibly five, four or five.

Q. Are some of them second hand?

A. I have some second hand machines, makes other than the Dalton which I have accepted in part payment for Daltons.

Q. What do you do with them?

A. Well, they are sold sometimes, when I can find a purchaser who wants to buy a second hand machine, or rent it in the same way.

38 Q. Do you sell it under a similar contract?

A. Yes.

Q. In all cases?

A. Not all cases. I have bought the second hand machine for myself in some cases and used it in trade, or sold it as a matter of speculation.

Q. Have you sometimes sold it in your own name? Did you purchase it from the company?

A. I purchased it from the company.

Q. And sold it in your own name?

A. Yes.

Q. And other times you sold it as agent of the company?

A. Yes.

Q. What form of contract was it?

A. The same form of contract that I use for the Dalton machine, except to change the name Dalton to whatever the name of the machine may be.

Q. If you get your price for the second hand machine, does that require the approval of the home office before you can give title to that likewise?

A. Yes, sir.

Q. Suppose a purchaser breaks a stand and wants to get another one, where does he get it from?

A. Breaks a stand?

Q. Yes, sir.

A. I would furnish him a stand on an order exactly the same as I would a new machine.

Q. And the approval of the contract likewise in such a case as that is necessary before you can give a good title to that stand, is that correct?

A. Yes, sir

Q. What is the object of the company requiring the contract for stands and parts to be approved by the company?

Mr. Bloomberg: If your honors please, I object to that question.

The Chairman: If he knows, I suppose he can tell.

A. Of course I don't know the object of the company in doing any of the things it does.

By Mr. Garnett:

Q. You have been with the company about how long?

39 A. About ten years.

Q. Where else have you done business for the company?

A. I spent five years of that time in the factory, the manufacturing department; two years in California and three years in Richmond.

Q. Then can you, from your experience with the company in the home office or manufacturing department, as an agent of the company, say what is their object in requiring the sale of an article to be approved before the purchaser can get good title?

A. No, I don't know what the object was.

Q. In all of your experience of five years as agent of the company, have you ever known of the company refusing to sell for cash where they got the full price for their goods?

A. I don't recall any specific instance, but I know there have been such instances:

Q. Where the title to the goods was refused to be passed, when the company could get and was offered the full price for the goods?

A. Yes, sir.

Q. Upon what grounds was the sale refused?

A. The sale has very often been refused in a territory not being worked by any solicitor, where there was no one to see that the machine was properly demonstrated and the operators properly instructed in its use, and looked after in that respect. They have refused to accept orders in many cases from an unopened territory.

Q. Let us limit the question, then, to cases where the territory has been opened, or where there is a representative, as in Virginia. Have you ever, in, your five years' experience known of the company refusing to confirm a sale which had been made for cash in such territory?

A. I do not recall any particular case. However, the cash transaction would have no effect if the other portions of the transaction were not in accordance with the company's rules.

Q. Let us take the case, then, where the full price has been gotten, where there was an agent, where the agent had proceeded in the manner provided by the company to carry out their will, and had

gotten an offer for cash, and had gotten the cash and transmitted the same to the home office, and the machine had previously been in the possession of the prospective purchaser; have you ever known of a case of that kind where the company refused to confirm the sale?

A. I have not.

Q. Will you now detail to the Commission the terms of
40 the oral contract between you and the Dalton Adding Machine Company, by which you represent them in the State of Virginia?

A. I came here to solicit orders for the Dalton Adding Machine Company with the understanding that the machines were to be furnished to me to demonstrate, and the forms on which to take orders were to be furnished, and any other forms required to make proper reports to the company; and with the understanding that all other expenses were to be paid by myself. I was not required to have an office, but, if I did have one, I was to lease it on my own responsibility, be responsible for the payment of rent, telephone and lights and other incidentals; pay all my own traveling expenses, be responsible for the salary or commissions of any assistants I might employ; and, as compensation for my efforts, I was to receive a commission on the sale of any machines which were made through my efforts as solicitor.

Q. Is that the full extent of your contract?

A. Yes, sir.

Q. Then your contract does not provide anything in regard to who shall pay for the loss of machines in Virginia which are injured or damaged; it doesn't provide any method of bookkeeping between you and the company?

A. None other than the reports which I am supposed to make, showing the machines and supplies received; that is a daily report, in which I show the movement of machines. For instance, when I put a machine in a man's office, I make an installation report of it; if I move it, I make a removal report; if I receive a machine from the factory, I make a factory report; if I ship it back to the factory, I make a factory report; if a ribbon is placed on a machine, I make a report of that, and also a roll of paper. Those are the daily reports. At the end of the month I make a monthly report, recapitulating all the information given on the daily report. That is all the detail work or bookkeeping that is required. Of course, for my own protection, I keep a commission account, I keep a ledger account of commissions earned, and I suppose they do the same thing on their ledger.

Q. Are your books inspected by the company?

A. No, sir.

Q. Does this company do its business on unwritten contracts all over the world?

41 A. I don't know. I have no reason to know whether they do or not.

Q. When you were agent for them in California, did you have a written contract?

A. I was not agent; I was simply assistant to the agent in California.

Q. Did the agent in California have a written contract?

A. I don't know.

Q. I will ask you to identify and file with your deposition this rental contract between your company and an unsigned party purporting to be made in Richmond, Virginia, on October 11th, 1913, for your machine No. 17595, and ask you if you have made such a contract as that?

A. (Examining.) I cannot identify it, not being signed by either party.

Q. In whose handwriting is that insertion?

A. It is mine.

Q. That is your handwriting?

A. Yes, sir.

Q. I will ask you, however, to file it as "Exhibit H. C. Grubbs No. 2."

Witness files said paper, which reads as follows:

Rental Contract.

(To be executed in duplicate, one copy retained by the lessee and one copy sent to the Dalton Adding Machine Co., Poplar Bluff, Mo.)

Not effective unless approved by the company.

Dalton Adding, Listing and Calculating Machines.

City Richmond, County Henrico, State Va. Street No. State Capitol Bldg.

Date Oct. 11, 1913.

To Dalton Adding Machine Company, Poplar Bluff, Missouri:

The receipt of the Dalton Adding, Listing and Calculating machine number 17595 and Sat. stand is hereby acknowledged, for the use of which I agree to pay a rental of $8.33 Dollars ($8.33) per month for a period of 3 months, said rental to be payable
42 at the office of the Dalton Adding Machine Company in Poplar Bluff, Missouri, on receipt of invoice.

The said Dalton Adding Machine is to be used in — Premises in Richmond, State of Virginia, and I further agree not to remove said machine from said premises without the written consent of the Dalton Adding Machine Company.

I further agree to become responsible for the safe keeping of the said machine and for any loss or damage done thereto, reasonable wear excepted, and to surrender the same to the Dalton Adding Machine Company on demand: (*a*) upon expiration of the above rental period; (*b*) upon default in payment of rentals when due, or the violation by the lessee of the terms of this agreement; or (*c*) in the event this shall not be approved by the said Dalton Adding Machine Company, as hereinafter provided.

I understand that the purchase price of a machine like the above is Three Hundred Dollars ($300.00), and if purchase is made within the above mentioned rental period, the amount paid as rental shall apply only on the purchase price of the machine, but not otherwise.

It is further agreed that this instrument shall not become effective unless approved and accepted by the said Dalton Adding Machine Company at Poplar Bluff, Missouri. Notice of such approval and acceptance is hereby waived. This writing contains all of the agreements between the parties. I have retained a duplicate hereof.

(Signed) ——— ———,

By ——— ———.

Witness:

H. C. GRUBBS, *Salesman.*

All checks to be drawn to the order of Dalton Adding Machine Co.

Q. Mr. Grubbs, you say that there is not a bit of correspondence in your office which would indicate the relation between yourself and the company, as to the contract between yourself and the company?

A. No.

Q. There never has been any correspondence of that character?

A. No.

The Chairman: What do you do with supplies and stationery and ribbons, which you say you keep on hand?

43 Witness: Your honor, where we have a machine on trial, we keep that machine supplied with paper and ribbons for use while the prospective purchaser is trying the machine. For the accommodation of those who own our machines, we keep this paper and ribbons to sell them.

The Chairman: You sell them from time to time.

Witness: Yes.

By Mr. Garnett:

Q. Have you got a copy of the contract by which you agree to keep these machines in order, or your repair contract?

A. I think I have.

Counsel for Dalton Adding Machine Company produces a copy of such contract.

The Chairman: Anyone in Virginia who has one of these machines, can order these supplies from you at any time, these ribbons and paper?

Witness: Yes, sir.

Commissioner Rhea: Suppose anybody in Richmond thinking of buying a machine should come to your place of business—can they do that—can they come there and inspect a machine, and you let them have a machine for the purpose of trying and testing it?

Witness: Yes, sir.

Commissioner Rhea: And then if he is satisfied with it, he can

keep that particular machine, if he is satisfied after looking at it and taking it to his office and trying it?

Witness: If he desires to keep that particular machine, he is allowed to keep it, yes, sir.

Commissioner Rhea: It is not shipped to your office for that particular purpose, but he is allowed to keep it if it is satisfactory after examination?

Witness: Yes, sir.

44 Commissioner Rhea: I understand you to say that if a person had another adding machine and desired to exchange it for one of your machines, you would make a contract with them and take their machine in as part of the price?

Witness: In part payment, yes, sir.

Commissioner Rhea: That contract is made between you and the owner of the machine, and you fix the price at which it is exchanged?

Witness: No, sir, that contract is made between the purchaser and the Dalton Adding Machine Company.

Commissioner Rhea: How is it done? Does the Dalton Adding Machine Company accept the price you fix in exchange?

Witness: We have a schedule of allowances we are authorized to quote on machines of other makes, and we simply write all of that on one form of contract and submit it to the company for approval, giving the serial number of the machine we propose to take——

Commissioner Rhea: How do they know how long it has been used?

Witness: They have a record and they can tell from the serial numbers of the machines about how long they have been used.

Commissioner Rhea: You set a price on the machine you propose to take in exchange and report it to the Dalton Adding Machine Company?

Witness: I am governed by the allowance list furnished me.

Commissioner Rhea: And that depends on how long the machine you take in exchange has been used, and how much it has been injured?

Witness: Yes, sir. But they don't know how long it has
45 been used; they are governed entirely by how long it it has been out of the factory.

Commissioner Rhea: They are not governed at all by any recommendation you make, as to how long it has been used and how it has been treated, things like that?

Witness: Very often, if I think the company can exceed the allowance on the list, I put that in the contract, and write the company that the machine is in good condition and I think it is worth more than I am authorized to allow; and in some cases they accept it and in some cases they reject it.

Commissioner Rhea: Are they not more or less compelled to accept your recommendafions, not having seen the machine?

Witness: They are not compelled to.

Commissioner Rhea: They do do it?

Witness: They do it in some instances.

By Mr. Garrett::

Q. I show you a paper purporting to be "Machine Service Contract, 3188," by which the company agrees, in consideration of ten dollars, to inspect, clean, oil, adjust and repair Dalton Adding Machine No. 13520, firm name Virginia Lines Tariff, etc. Is that the form of repair contract which you make with your customers?

A. It is the form which the company makes and uses.

Q. I will ask you to file that as "Exhibit H. C. Grubbs No. 3."

Witness files said paper, which reads as follows:

Machine Service Contract.

EAST NORWOOD, CINCINNATI, OHIO, 7-28, 1914.

For and in consideration of Ten Dollars, the receipt of which is hereby acknowledged, we agree to inspect, clean, oil, adjust and repair Dalton Adding Machine No. 13520, Firm Name Virginia Lines Tariff, Street No. —, City Richmond, State Va., as often as may be necessary to cause it to render efficient service for one
46 year, from the 10th day of July, 1914, to the 10th day of July, 1915; it being understood that this contract is intended to cover all repairs to the machine of every nature that are incident to the natural or normal use of the same, and that it is not intended to cover the cost of such repairs as may be made necessary by abuse, accident or fire.

If the machine covered by this contract needs attention at times other than during our regular inspection trips, we agree to give the needed attention promptly upon receipt of information describing generaly the nature of the trouble, accompanied by a sample of work from the machine.

DALTON ADDING MACHINE COMPANY,
By B. C. HARRISON.

Important.

The special clauses pertaining to Ribbons on the reverse side hereof are a part of this contract.

(Reverse.)

The ribbons sold by us for use with our machines are the best that can be made at any price. They are manufactured in accordance with our own specifications by application of especially prepared colors to an imported fabric which we have found by long experience to be best suited to the printing and ribbon controlling mechanism of the Dalton.

Cheap ribbons with which the markets are flooded are sometimes tempting on account of their low first cost, but we have by actual test found them in every instance more expensive to the user from the standpoint of ribbon cost alone than our own special ribbons,

to say nothing of the adding machine troubles that are traceable directly to the use of ribbons not suited to our printing and ribbon control mechanism.

Frequent expensive repairs and adjustments to the machines have been made necessary by the use of these worthless, gummy, uneven ribbons, which are usually of incorrect length and mounted on improper spools.

To protect ourselves and our customers against loss in-
47 cident to the use of improper ribbons, we have applied for patents on our special ribbon controlling mechanism which includes the spools and special fastening at the ends of the ribbon and we will vigorously prosecute, those who attempt to sell an inferior ribbon for use in combination with our novel mechanism. To that end we will appreciate information from our customers and friends regarding those other than our regularly authorized sales agents who attempt to sell Dalton ribbons.

To further protect ourselves during the life of this guarantee against loss incident to mechanical troubles due to the use of these faulty, gummy and uneven ribbons, we hereby give notice that this guarantee will be considered cancelled if ribbons other than our own are used on the machine covered by this guarantee during the life thereof.

Dalton special ribbons can be purchased either direct from us or through any of our regular sales agents at the following prices:

Single Ribbons, each	$1.00
Coupon Books good for 6 ribbons	5.00
Coupon Books good for 12 ribbons	8.50

We recommend the coupon plan of purchase as this guarantees ribbons fresh from our stock.

DALTON ADDING MACHINE COMPANY.

Q. Who makes those repairs?

A. I make them in some instances, and I have a mechanic who makes most of them. I have in some instances made some of them myself.

Q. You have a mechanic employed here in Richmond?

A. Yes, sir.

Q. Who pays the mechanic?

A. The Dalton Adding Machine Company.

Q. It is his business to make repairs in the State of Virginia, according to that contract?

A. Yes, sir, to maintain the guarantee given with every machine sold, by which we agree to keep it in repair without cost to the purchaser.

Q. And sometimes you agree for two years, and sometimes for one year.

48 A. The agreement was changed in July; before that time we guaranteed to keep every machine in repair for two years, and since that we have reduced it to one year.

Q. Then it is his duty on behalf of the company to keep in repair machines in Virginia for a year after they have been sold?
A. Yes.
Q. And then, after that time, it is his function on behalf of the company to comply with that contract which has been filed by you, and keep in repair machines at ten dollars a year, is that correct?
A. Yes.
Q. You make those contracts with practically all of your purchasers, do you not?
A. No, with very few of them.
Q. Are you willing to make them with all?
A. Willing to, yes, sir.
Q. You have no qualification, exception, or addition to that?
A. No.
Q. I will also ask you to file with the Commission as "Exhibit H. C. Grubbs No. 4" the order of the Norfolk & Western Railway Company, in regard to which you have heretofore testified.

Witness files said paper, which reads as follows:

C. T. 45 Rad. Div.

Norfolk & Western Railway Company.

Order 3202.

E. T. Burnett, Purchasing Agent.

ROANOKE, VA., March 6th, 1913.

Dalton Adding Machine Company, c/o Mr. H. C. Grubbs, Va. Sales Mgr., 22 North 7th St., Richmond, Va.:

Please furnish the Norfolk & Western Railway Company the supplies described below, and send bills on our forms with shipping receipt, upon each consignment, direct to the purchasing agent.

This Company does not pay for boxes and cartage.

49 NOTICE:—Payments are made only by vouchers, which will be mailed by the Treasurer. Drafts for purchases made by this department will not be honored. Vouchers sent by the Treasurer must be signed by the person or firm in whose name they are drawn, or if signed by any other person, the authority for so doing must in all cases accompany the voucher. When properly signed and receipted, vouchers are negotiable in the same manner as *as* ordinary bank check.

1 Dalton Adding Machine and Stand equipped with A. C. Motor, 110-Voltage, 60-Cycle, 10″ Paper Carriage.

The above to be similar to that furnished by you on a/c of my order No. 5814, dated 5/2/1912.

For $350.00 less 5% 10 days.

NOTE.—The above to be subject to Protective Guarantee, as per your letter dated April 29th, 1913, per Jas. L. Dalton, Pres.

Ship by e-press.

If from Richmond, Va., via Southern Express.

If from Poplar Bluff, Mo., via U. S. Express c/o Southern Express at either Cincinnati or Columbus, Ohio.

Ship Promptly. Shipping receipts covering Shipments must be attached to all bills.

Mark and ship as follows: Norfolk and Western Railway Company, Care of H. D. Guy, Agent, Roanoke, Va., Via Express (as noted above.)

If you cannot fill this order by date named, please advise me at once.

E. T. BURNETT,
Purchasing Agent.

50 Mark number of this order, where and to whom consigned on your bills.

The Chairman: This repair contract that you say you make with those people who desire it—suppose a machine that you have sold gets out of order, belonging to a man with whom you have no such contract, do you attend to that at his request?

Witness: We attend to that at his request, and make him a reasonable charge for the time spent in making the repairs.

The Chairman: Who fixes that charge?

Witness: The Dalton Adding Machine Company.

The Chairman: How do they know it? Who reports it to them?

Witness: The man who does the work makes a written report of the amount of time spent on the job.

By Mr. Bloomberg:

Q. Mr. Grubbs, how long have you been acquainted with Mr. Dalton?

A. For approximately ten years.

Q. What have been your personal relations with him?

A. Well, I have been identified with him in the business he is now engaged in, in different capacities, practically ever since he has been in the adding machine business.

Q. Will you state whether there is any reason a contract was not made with you, if it is customary to make contracts with salesmen?

A. The only reason I can give for that is on account of my personal association with Mr. Dalton in his business for the length of time I have been associated with him, he would naturally assume I was familiar with the terms and conditions under which solicitors work.

Q. Have you the lease, or leases, of offices you have rented in Richmond?

A. Yes, sir.

Q. Will you please let us see them?

Witness produces same.

51 The Chairman: I suppose it is not controverted that he has paid rent for offices?

Mr. Garnett: No, sir, I do not controvert it.

Said leases are filed as "Exhibits H. C. Grubbs, Nos. 5 and 6," and read as follows:

This Deed of Lease. Made this 1st day of March, 1912, between J. A. Connelly and Arthur E. Chapman, by J. A. Connelly & Co., Agents, of the one part, and H. C. Grubbs, of the other part,

Witnesseth, that the said parties of the first part do demise unto the said party of the second, the following property, to-wit: That certain brick store with floor above, known and designated as No. 22 North 7th Street, Richmond, Va. The premises hereby leased are to be used as offices and sales room from the 1st day of March, 1912, for the term of Ten (10) months from thence next ensuing, and to expire on the 31st day of December, 1912, yielding therefor during the said term the rent of Three Hundred and Twenty-five ($325.00) Dollars, payable in advance as follows, to-wit: In monthly installments of $32.50 each the first installment to become due on the 1st day of March next.

The said Lessor covenants for Lessee quiet enjoyment of his term; that if the said building shall be so injured by fire as to render the same untenantable, this lease shall be determined.

The said Lessee covenants to pay the rent in the manner above stated; that he will not assign or sub-let the premises without leave; that he will leave the premises in good repair, natural wear and tear excepted; that the premises shall not be used during the said term for any other purpose or purposes than those above specified.

A notice of three months in writing shall be required from the said lessee should he desire to vacate the said premises at the termination of this lease, viz:—on the 31st day of December, 1912; and should the said lessor desire possession, a like notice shall be required. And in the event that no such notice shall be given, then this lease shall continue in full force and effect from year to year from expiration, subject to all the covenants and conditions herein contained.

52 In event notice to vacate shall have been given by either party, the said lessee hereby covenants and agrees to allow the said lessors, their agents or assigns to placard the said premises for rent in one or more conspicuous places, and also to allow said lessor, their agents, or assigns the privilege of showing these premises to any person desiring to rent the same.

The said lessee covenants and agrees that he will keep the Range, Latrobe Stove, Furnace, Hot Water or Steam Radiators, Boiler, Water-Pipes, Water, Electric and Gas Fixtures in order; to replace all Gas globes and glass broken during this tenancy at his own expense; that he will unstop all Waste-pipes, Water-closets and Culverts that may become choked by negligence or inattention on the part of those using them; that he will repair all Water-pipes that may burst from freezing because of failure to turn off the water; that he will pay all bills for Gas, Electricity and Water used on said premises during this tenancy or any continuance thereof.

The said lessee hereby acknowledges the receipt of all Keys and

all Gas Globes, which he covenants to return to the said lessors in good order, or the equivalent thereof in cash, and the said lessee further covenants that the lessors may re-enter in 5 days, for the breach of any covenant herein contained, and especially for, or on account of non-payment of rent, actual demand therefor by the landlord, their agents or assigns being hereby expressly waived.

The lessee hereby expressly waived the service of notice of intention to re-enter, or instituting the legal proceeding to that end.

The said lessee hereby declares that all furniture to be put up in said houses or on said premises during said term, or any continuance thereof, is owned by him, is fully paid for, and is in no way encumbered by deed, bill of sale or otherwise.

Witness the following signature and seal:

J. A. CONNELLY &
A. E. CHAPMAN,
J. A. CONNELLY & CO., *Agents.* [SEAL.]
H. C. GRUBBS. [SEAL.]

— bind — as the security of the fulfillment on the part of the lessee of all the obligations and covenants entered into by —— —— as above and for as long as — continue to occupy the premises mentioned in this lease. — hereby waive — homestead and all other exemptions as to this obligation.

53 Witness — hand and seal this — day of ——.

—— ——, [SEAL.]
—— ——, [SEAL.]

No. —.

Deed of Lease.

J. A. Connelly & A. E. Chapman to H. C. Grubbs, $390.00 per annum.

Expired December 31, 1912.
J. A. Connelly.
Arthur E. Chapman.

J. A. Connelly & Co., Real Estate.

Richmond, Virginia.

This Deed of Lease, Made this 28th day of November, 1913, between J. A. Connelly and Arthur E. Chapman, by J. A. Connelly & Co., Agents, of the one part, and H. C. Grubbs, of the other part—

Witnesseth, that the said parties of the first part do demise unto the said parties of the second part the following property—to-wit: That certain store building known and designated as No. 22 North Seventh St., Richmond, Virginia. The premises hereby leased are to be used as offices and sales room, from the 1st day of January,

1914, for the term of One Year from thence next ensuing, and to expire on the 31st day of December, 1914, yielding therefor during the said term the rent of Three Hundred and Ninety ($390.00) Dollars, payable as follows—to-wit: in monthly installments of $32.50 each, the first installment to become due on the 1st day of February next.

The said Lessors covenant for the Lessee quiet enjoyment of his term; that if the said building shall be so injured by fire as to render the same untenantable, this lease shall be determined.

The said Lessee covenants to pay the rent in the manner
54 above stated; that he will not assign or sub-let the premises without leave; that he will leave the premises in good repair, natural wear and tear excepted; that the premises shall not be used during the said term for any other purpose or purposes than those above specified.

A notice of three months, in writing, shall be required from the said Lessee should he desire to vacate the said premises at the termination of this lease—viz, on the 31st day of December, 1914, and should the said Lessor desire possession, a like notice shall be required. And in the event that no such notice shall be given, then this lease shall continue in full force and effect from year to year from expiration, subject to all the covenants and conditions herein contained.

In event notice to vacate shall have been given by either party, the said Lessee hereby covenants and agrees to allow the said Lessors, their agents or assigns, to placard the said premises for rent in one or more conspicuous places, and also to allow said Lessors, their agents or assigns, the privilege of showing the premises to any person desiring to rent the same.

The said Lessee covenants and agrees that he will keep the Range, Latrobe Stove, Furnace, Hot Water or Steam Radiators, Boiler, Water-Pipes, Water, Electric and Gas Fixtures in order; to replace all Gas Globes and Glass broken during this tenancy at his own expense; that he will unstop all Waste-Pipes, Water-Closets and Culverts that may become choked by negligence or inattention on the part of those using them; that he will repair all Water-Pipes that may burst from freezing because of failure to turn off the water; that he will pay all bills for Gas, Electricity, and Water used on said premises during this tenancy, or any continuance thereof.

The said Lessee hereby acknowledges the receipt of all Keys and all Gas Globes, which he covenants to return to the said Lessors in good order, or the equivalent thereof in cash, and the said Lessee further covenants that the Lessors may reenter, in five days, for the breach of any covenant herein contained, and especially for or on account of non-payment of rent, actual demand therefor by the landlord, their agents or assigns, being hereby expressly waived. The Lessee hereby expressly waives the service of notice of intention to re-enter, or instituting the legal proceeding to that end.

That said Lessee hereby declares that all furniture to be put up

in said house or on said premises during said term, or any
55 continuance thereof, is owned by him, is fully paid for, and is in *my* way encumbered by deed, bill of sale, or otherwise.

Witness the following signatures and seals:

J. A. CONNELLY AND
ARTHUR E. CHAPMAN,
By J. A. CONNELLY & CO., *Agents.* [SEAL.]
H. C. GRUBBS, [SEAL.]

— bind — as the security for fulfillment on the part of the Lessee of all the obligations and covenants entered into by —— —— as above, and for as long as — continue to occupy the premises mentioned in this lease. — hereby waive —— homestead and all other exemption as to this obligation.

Witness — hand and seal this — day of ——.

—— —— [SEAL.]
—— —— [SEAL.]

No. —

Deed of Lease.

Connelly & Chapman, to H. C. Grubbs, $390.00 per Annum.

Expires December 31, 1914.

J. A. Connelly. Arthur E. Chapman.

J. A. Connelly Co., Real Estate,

RICHMOND, VIRGINIA.

By Mr. Bloomberg:

Q. These are the only two leases under which you have rented offices?

A. Yes.

Q. Please state who paid the rent under this lease?

A. I did.

Q. And you have paid it always?

A. Always.

56 Q. And all expenses in connection with the office?

A. Yes, sir.

Q. Who is the owner of the furniture in the office?

A. I am.

Q. Have you paid taxes on that regularly?

A. Yes, sir.

Q. And the only property of the company in your office consists of sample machines and supplies?

A. Yes, and the reports, stationery and reports.

Q. You have made two affidavits previously about the matters involved in this case; state whether or not you have read them recently?

A. I have.

Q. State whether you can adopt the facts and statements contained in those affidavits as your testimony to-day?

A. Yes.

Q. Have you read the affidavits made by Mr. Dalton, previously referred to?

A. Yes.

Q. Will you please state whether the facts stated in them apply equally as well today?

A. Yes.

Mr. Garnett: So far as they were made on the information of Mr. Dalton he cannot state whether they are true or not. So far as his personal information goes, he can state they are true.

The Chairman: Well, let it go.

By Mr. Bloomberg:

Q. Have you read the answer in this case?

A. Yes.

Q. Are the statements therein true statements of the methods pursued by the company in doing business in this State?

A. They are, yes.

Q. If an order is solicited by a sub-salesman of yours, what is the course of that order?

A. That order comes to my office and I send it to the office of the Dalton Adding Machine Company in the usual way, through the mails, and if that order is accepted, when the machine is paid for I credit commissions to the salesman in accordance with whatever arrangements we may have.

Q. In other words, every order through a sub-salesman goes through your office?

57 A. Through my office.

Q. Every order from the territory goes through your office, does it?

A. Through my office, yes.

Q. Does the defendant keep a bank account in Virginia?

A. No.

Q. Does it have any other property in the State besides the sample machines and supplies you have spoken of?

A. No.

Q. Does the company as such keep any office in this State?

A. No.

Q. Has there been at any time a meeting of the stockholders or directors or officers of the company in this State?

A. No, sir.

Q. Coming now to the question of ribbons and papers sold by you, will you please state the total gross amount of sales from the time you began doing business in February, 1912, up to April 1st, 1915?

A. The gross sales of ribbons—I will say I think that covers ribbons and paper—are $513.90 from February 1st, 1912, to April 1st, 1915.

Q. What is the gross amount of sales of machines for the same period?

A. $65,204.40.

Q. What part of the ribbons and papers sold were sold for cash received in the city, and what part were billed from Ohio; can you give an estimate of that?

A. I will say that I believe all of it was billed. In some cases receipted invoices were mailed where the cash was sent in. In other cases the invoices were sent out in the usual way where the cash had not been sent in; but in every instance I believe that the supplies have been billed from the home office.

Q. Will you show us a roll of this paper?

Witness exhibits a roll of paper.

Q. That is the paper referred to in your testimony all the way through, is it?

Q. And the ribbon?

Witness exhibits a ribbon.

58 Q. The rolls of paper are similar to this, and the ribbons are such as you have in your hand, and those are the supplies which the company keeps in Virginia?

A. Yes.

Q. Now of the thirty machines which you said were placed through Virginia on trial, please state how they came into the State, whether they came from your office, or whether they were shipped in a great many instances direct from the company's office to the prospective buyer?

A. Those shipped to Richmond for trial were shipped to my office; those shipped outside of Richmond for trial were shipped direct to the office of the man trying them.

Q. So a machine shipped to Roanoke, Petersburg, Lynchburg, anywhere outside of Richmond, to be placed in the office of a prospective purchaser for trial, is shipped directly from the home office of the company?

A. Except as in such instances as a salesman might be in that locality and the machine might be shipped to him at the express office so that he could examine it and see if there was any damage to it before it was placed in the prospective purchaser's office.

Q. In how many cases, of the thirty machines mentioned, were they shipped from outside of the State, from the home office of the company to the prospective purchaser?

A. Well, I am not able to answer that question accurately, but I will say possibly two-thirds of them were shipped directly to the prospective purchaser.

Q. From the home office of the company?

A. Yes, sir, from the home office of the company.

The Chairman: And the others were shipped through you?

Witness: The others were shipped to my office, where I take them out from my office.

By Mr. Bloomberg:

Q. And those placed by you, I understand, were placed in the city of Richmond?

A. Yes.

Commissioner Rhea: Right there; do I understand that they shipped the machines to you, that they are not sold before they are shipped to you, but are shipped to you for the purpose of demonstrating them to people who might want to buy them?

59 Witness: That is right, yes, sir.

By Mr. Bloomberg:

Q. Now, concerning the repairs. Can you give us any idea of the percentage of receipts from repairs as compared with the cost of making such repairs?

A. Well, in view of the fact that no charge is made for repairing any of the machines for the first two years, on account of the machines having been guaranteed for two years, the receipts as a result of repairs would amount to certainly less than five per cent of the amount of the actual expenses of making the repairs.

Q. By the expense, you mean expense to the company?

A. The expense to the company.

Q. In other words, on every dollar of repairs made, there is a loss of approximately 95 cents?

A. Certainly that much.

Q. What is the reason for making these repairs and entering into these contracts?

A. Well, a prospective purchaser in no instance would buy a machine constructed of the complicated mechanism that an adding machine is constructed of, unless he were assured of the fact that in case the machine got out of order it would be promptly repaired. If we did not agree to keep the machine in repair, we would be unable to sell it.

Q. You have found, then, from experience in this business, that an arrangement for making repairs is absolutely essential to conduct the business?

A. It is absolutely necessary, yes, sir.

Q. Mr. Grubbs, in receiving a proposal for the purchase of a machine which has been left on trial at the office of the prospective purchaser, I understand you to say that in each case the proposal or order to buy that machine is signed, and it is forwarded to the company by you?

A. Yes, sir.

Q. Has that been the case in every instance?

A. Yes, sir.

Q. And there has been no exception to it whatever?

A. No, sir.

Q. You have absolutely no authority to transfer title or sell the machine, or make absolute disposition of any property belonging to the company, have you?

A. No, sir.

Q. And this applies likewise to machines that you have
60 taken in exchange, as well as new machines manufactured by the Dalton Adding Machine Company?

A. Yes, sir, to any of the Dalton Adding Machine Company's property.

Q. And in cases where there may be justification for a larger allowance for a traded-in machine than is set forth in the tariff or schedule published by the Dalton Adding Machine Company, you take up with the company the reasons for this increased allowance, and upon your recommendation the company either accepts or rejects the larger allowance, is that true?

A. Yes.

Q. Have you any authority to fix a definite amount for that where it is excess of the scheduled value?

A. I have no authority to fix any price or terms for a traded-in machine, I simply refer them to the company.

Q. And even where the traded-in value is in accordance with the schedule submitted you by the Dalton Adding Machine Company, you have no right to close it on that basis, but must submit it to the company for their approval?

A. Yes, sir.

Commissioner Rhea: But really you change the terms of that schedule; they go on your recommendations?

Witness: In some cases they do and in some they do not.

By Mr. Bloomberg:

Q. In reference to putting machines out on trial, do you find that essential to the conduct of the business?

A. It is absolutely essential, for the reason that the average prospective purchaser of an adding machine has very little idea of how much use he can make of that machine, or how much time it will save him, and you have got to convince him that it will save him time to sell him, and the only way you can convince him is to get him to try it.

Q. How long have the Dalton adding machines been sold in Virginia?

A. Since February, 1912.

Q. Were they known in the State prior to that time?

A. They were, so far as my knowledge goes, absolutely unknown.

Q. Therefore, being an unknown machine to the people of this State, it was essential for those machines to be put out on trial or test, was it?

61 A. Absolutely essential; much more so than it would have been if the machines had been sold here previously.

Q. You would not have been able to get orders or proposals to buy machines unless you were in a position to have them exhibited to and tried by prospective purchasers, would you?

A. No, sir.

Q. Does not the same situation exist today?

A. It does exist, possibly not to the same extent as previously, but the fact still exists that we have to convince the prospective purchaser

that the machine will save him time and eliminate errors in his accounting work in order to be able to sell him, and that condition I think will always exist.

Q. And the only way you can do that is by putting the machine in his office for a trial or test?

A. Yes, sir.

Q. I also understood that in every case where a machine was bought, or there was a proposal to buy a machine signed by a person outside of Richmond, the machine is shipped into the State from the principal office?

A. Well, I would not say in every case, but in the majority of cases.

Q. And in the other cases, the machine has already been put there on trial?

A. Yes, sir.

Q. Now, who pays the taxes on property located in this State belonging either to you or to the Dalton Adding Machine Company?

A. I pay an ad valorem tax on the sample machines I have in my office.

Q. Do you pay taxes also on your personal property?

A. On my personal property, the furniture and fixtures in my office. I pay also a manufacturer's license, state and city.

The Chairman: Have you that contract with the Dalton Adding Machine Company?

Witness: I have no written contract, but I had an understanding that I should pay all local taxes assessed; that is my verbal agreement with Mr. Dalton.

By Mr. Garnett:

Q. Mr. Grubbs, you said that you are acquainted with the affidavit filed in the former trial before the District Court of the United
62 States by Mr. Dalton. Mr. Dalton made affidavit to this effect:

"The method of selling the Dalton adding machine in Virginia has been the same as the method carried on by the company in other states since the day it began marketing its machines."

If you are acquainted with what that means, does that mean that they employ salesmen in other states just as they do in Virginia?

A. Yes.

Q. And in the same way they make their contracts with the salesmen?

A. I don't know about the contracts; they employ the same methods.

Q. You have spoken of your authority to give title to property, and you said that you had no authority to give title to the property of the company. You mean to say this that you have no written authority?

A. Yes.

Q. Suppose that a purchaser wishes to buy a stand, what contract do you enter into with him?

A. The same contract that I would on a machine.

Q. The stand is entirely separate and distinct from the machine, is it not?

A. Well, ordinarily a stand goes with a machine. When we sell a machine we give a stand with it as a part of the equipment.

Q. But, as a mechanical device, the two are separate and distinct—the machine can be separated from the stand and the stand from the machine?

A. Yes.

Q. Therefore, you can sell them a stand without selling them a machine?

A. Yes.

Q. Now, if the purchaser of a machine breaks the stand and wants to get a new one, do you in such a case enter into a written contract for that?

A. Yes.

Q. When he wants new parts, do you enter into a written contract with him for that?

A. No.

Q. You said that the repairs were made by you at a loss. The repairs for the first year, and formerly for the first two years,
63 were a part of the consideration of the contract, were they not?

A. Yes.

Q. And the repairs subsequent to that he paid for, as I understand, according to either an annual contract or the bills you rendered him?

A. Yes, sir.

Q. In making repairs, you take into consideration that you are doing competitive business, do you not?

A. No, sir.

Q. You said you were doing them at a loss?

A. Yes.

Q. Why do you do them at a loss?

A. Purely for the accommodation of our customers.

By Mr. Bloomberg:

Q. Is the shipment of stands into the State, and the sale of stands—does that in every way follow the shipment and sale of machines?

A. Except that the stands usually come by freight and the machines by express.

Q. Except that there is no difference?

A. No.

Q. Have you any authority, verbal or written, to dispose of the property of the company?

A. No authority, either verbal or written.

Q. But, on the contrary, the understanding is that you shall not do so?

A. Yes.

Q. Of what parts do these repairs that you have mentioned consist?

A. I don't quite understand.

Q. What parts of the machine are involved?

A. Principally small springs, as far as the parts are concerned; that is about the only part that gets out of order and has to be replaced—springs. Sometimes a screw gets loose and has to be tightened. Very few parts are used.

Q. What parts have you here on hand?

A. A very small supply of screws and springs, that might get out of adjustment.

Q. The total value of all of that is what?

A. Well, I am not able to say what the manufacturing cost
64 would be; it would be very trifling; I certainly think it would not amount to ten dollars.

By Mr. Garnett:

Q. In one of the contracts which you have furnished in your answer, it is provided that the Dalton Adding Machine Company shall have the right to retake the property in case it is not paid for, in case of rentals not paid for, etc. You do business all through the country under the same contract, do you not?

A. I think so, so far as I know.

Q. Mr. Dalton said so in his affidavit, and you said he told the truth?

A. Yes.

Q. So you do business all over the country just like you do in Virginia?

A. Yes.

Q. Whose duty would it be to institute legal proceedings for the purpose of taking back property that had not been paid for—in other words, to avail yourself of the power given in the contract to take it back?

A. It would be the duty of the Dalton Adding Machine Company.

Q. Who would represent them? Would you, in Virginia?

A. No.

Q. Would you employ a lawyer?

A. No, sir.

Q. Have you ever had to do that?

A. No, sir.

Q. It would have to be done, then, outside of the company's agents?

A. I have gotten permission from the Dalton Adding Machine Company to employ a lawyer, but I have never done it personally.

Q. You have employed a lawyer, after consulting with the company?

A. Yes.

Q. Presumably that is the method by which they avail themselves of that provision in the contract, is it not—through their local agents?

A. The local agent would be compelled to submit a proposition of that kind to the company and get authority to employ a lawyer from the company, and that lawyer would be employed by the company and would be given to understand that he would have to
65 look to the company for remuneration.

Q. I understand that clearly, but I also understand you

to say that you have yourself, after having gotten authority from the company, employed lawyers to represent them in availing themselves of contracts like this?

A. Yes.

Mr. Bloomberg: How often have you done that?

Witness: Once.

(At this point, 1 o'clock P. M., the Commission rose until 2:30 o'clock P. M., when the same witness resumed his testimony.)

By Mr. Garnett:

Q. Mr. Grubbs, are you now able to furnish the information asked for?

A. I was not able to find any correspondence relating to a rental contract that had been rejected. As a matter of fact, the contract was not sent in; I simply wrote them about making a rental contract, and they advised me not to make it, that they could not accept it.

The Chairman: That was a rental contract for what?

Witness: for a machine.

By Mr. Garnett:

Q. Have you any correspondence about a rental contract which you submitted and which was not approved of?

A. No; only correspondence where I wanted to submit one and they told me that it was not worth while, that they would not accept it.

Q. I also understand from your answer that you have no record of a sale for cash which was submitted and disapproved?

A. No.

The Chairman: What was the objection to the rental contract which was submitted and disapproved?

Witness: Simply the decision that the company did not rent electric machines. We have both hand driven and electric
66 machines; we do not rent the electric machines.

The Chairman: That is your general rule?

Witness: Yes, sir.

The Chairman: And you were asking them to make an exception?

Witness: Yes, sir.

Commissioner Rhea: I understand that your company agreed to furnish you machines in Richmond for exhibition?

Witness: Yes, they agreed to furnish me demonstrating machines.

Commissioner Rhea: Of course it is necessary for you to have some place to exhibit your machines?

Witness: Well, except that I might take them to the intending purchaser's office and exhibit them there. It is customary to have an office or place to exhibit the machines, but it is not required.

Commissioner Rhea: You expect to do that?

Witness: Yes, I expected to do that.

Commissioner Rhea: And you knew you would have to pay rent?

Witness: Yes.

Commissioner Rhea: Was the amount of rent you would have to pay taken into consideration in fixing the commission on the sale of machines?

Witness: No, sir, no. As I understand, it is the fixed rule of the company to pay all agents at the same rate of commissions, and the expenses of the agent are not considered in fixing the commissions.

Commissioner Rhea: Do all agents pay rent for space to exhibit these machines?

67 Witness: As far as I know, yes, sir.

Mr. Bloomberg: You could have kept those machines at your own home, couldn't you?

Witness: Just as well. It would not have been as convenient for intending purchasers.

By Mr. Garnett:

Q. The catalogue of the company has been submitted for my inspection. I do not think it is necessary to cumber the record with the reading matter thereof at all, but I do want to prove some things from it, and therefore I will ask one or two questions from it. Mr. Grubbs, I note from the catalogue of machines and parts that you have various forms of stands which are furnished: is that true?

A. The company has various forms, yes.

Q. It is possible that the owner of a machine, therefore, could use more than one stand with his machine, is it not?

A. No. They are only put there as a matter of choice, to allow him to select just the stand he chooses.

Q. Suppose a purchaser wishes to use a Satellite stand for one purpose, and a High Toledo stand for another purpose, do you let him do that?

A. I have never taken that up; I don't know whether the company would allow that or not.

Q. The stands have under them a code word; that is for ordering purposes, is it not?

A. Yes, sir.

Q. Therefore, you do order stands without machines, and vice versa?

A. The object of that code word—we very often report a sale by wire; for instance, if I sell a 9-10 regular standard machine and satellite stand, that code word is for the purpose of transmitting that intelligence by wire.

Q. I find also the Moody travelling desk stand; would not a person using that also be likely to use a satellite stand?

A. No, he would not be.

Q. But you would sell him either one or the other, or both, with his machine?

A. I would not sell him either. I would submit his proposition to the company, and if they thought advisable I would sell it to him.

Q. When I said "you" there, I meant the company.

68 A. That question never having come up to my knowledge, I don't know just how they would rule on it.

Witness was then excused.
Said catalogue is exhibited to and examined by the Commission.

DAVIS BOTTOM, was duly sworn and testified as follows:

By Mr. Garnett:

Q. What is your name, age and occupation?
A. Davis Bottom; 48; superintendent of public printing of the State of Virginia.
Q. As superintendent of public printing, did you order, or did you have any dealings with the Dalton Adding Machine Company?
A. Yes, sir.
Q. Relate to the Commission your experience with them.
A. We found it desirable to have an adding machine, and I took the matter up with the representatives here of the Dalton Adding Machine Company and of the Burroughs Adding Machine. I had the machine put in my office for demonstration, and then not being in a position to purchase the machine, I took up the question of hiring a machine until I could get from the Legislature, or ascertain how I might buy one. The Dalton Adding Machine representatives got on the ground first and put in their machine first, and I rented the machine on their contract with the privilege of purchasing the machine, and, if it was purchased, that the rental paid on it would be deducted from the purchase price of the machine, subject to those conditions as set forth in the contract.
Q. Will you examine this rental contract, marked "Exhibit H. C. Grubbs No. 2," and say whether that is a copy of the contract which you signed?
A. (Examining): Yes, sir, I think that is a copy of the contract which I signed.
Q. Did you ever receive any approval of this rental contract?
A. I don't recollect ever having received any. I may have. That has been three years ago.
Q. Have you searched your files for it?
A. Well, I looked for the purchase contract: I didn't look
69 specially for the rental contract. They may have acknowledged the rental contract.
Q. You are not certain on that proposition?
A. Not certain. They may have and may not.
Q. Will you examine your files and let the Commission know?
A. Yes, sir. I am quite sure that if you send down there, Mr. Atkinson, my assistant, will look the matter up.
Q. I will ask you to look at this written contract dated May 5th, 1914, purporting to be filed by you, and file it with the Commission if it is.
A. (Examining) Yes, sir, that is my signature.
Q. Was it taken from the files of your office?
A. Yes, sir, taken from the files of my office.
Said contract is filed as Exhibit Davis Bottom No. 1, and reads as follows:

(BOTTOM—Ex. No. 4.)

Duplicate to be retained by the signer.

No. —.
Current —.
Voltage —.
Cycles —.

City, Richmond. County, Henrico. State, Va. Date May 5th-1914.

Dalton Adding Machine Company, Poplar Bluff, Missouri:

Please enter my order for one Dalton Adding, Listing and Calculating Machine, Model 9-10 Sec.-Hand, Serial Number 13277 and H. T. Styles *t*and, delivered to the undersigned at Richmond, I Va., carrying charges prepaid, for which we agree to pay to the order of the Dalton Adding Machine Company at Poplar Bluff, List price of equipment must appear here Missouri, Two Hundred and no-100 Dollars, ($200.00) as follows: $25.00 rental paid on Dalton machine No. 17595 to be deducted, the balance less 5% for cash.

A discount of 5 per cent shall be allowed on the net amount 70 of this order for cash payment within ten days from date of invoice.

Above machine to be guaranteed for a perior of two years from date of purchase against defects of material and workmanship.

The conditions printed on the reverse side hereof constitute a part of this order.

An exact duplicate hereof has been retained by the undersigned.

(Signed) DAVIS BOTTOM,
Supt. Pub. Ptg. of Va.

Witness —— ——.
Solicitor —— ——.

All checks to be drawn to order of Dalton Adding Machine Company.

This Order Subject to Approval of the Dalton Adding Machine Company at its office in Poplar Bluff, Missouri.

Approved: —— ——.

(*Conditions on Back of Order Blank.*)

(1) The said Dalton Adding Machine equipment is to be covered by your written guaranty, whereby you shall agree to make good any defects of material or workmanship for a period of two years from date of purchase.

(2) Title to the within described property shall remain in you until payment of the purchase price has been made in full, and the within signer hereby agrees not to remove the said property from the place of original delivery so long as any part of the purchase

price remains unpaid, without first securing the written consent of the Dalton Adding Machine Company. The within signer further agrees to assume the risk of loss and damage to said property.

(3) In case of failure to make any payment in time and manner as herein provided, the entire unpaid balance of the purchase price shall become immediately due and payable; and you may, without legal process, retake said property; and in such event the within signer hereby agrees to make delivery thereof to you immediately upon request.

(4) In event of your retaking said property as above provided, any amount that may have been paid thereon shall be con-
71 sidered as payment for use, ordinary wear and depreciation of said property while in the possession of the within signer, and shall be retained by you. If the amount so paid does not cover the reasonable rental value of said property, the within signer hereby agrees to pay you on demand the balance of such reasonable rental. Nothing in this order shall be construed as obligating you to accept return of property tendered in lieu of purchase price agreed to be paid.

(5) All statutory provisions as to retaking and resale of the property within described are hereby expressly waived. If a claim hereunder is placed in an attorney's hands for collection, ten per cent shall be added thereto and paid as attorney fees.

(6) This order covers all agreements between the within signer and the Dalton Adding Machine Company, either express or implied; and when approved by said company at its executive office becomes a contract between the parties as purchaser and seller respectively. It is expressly agreed that this order shall not be countermanded.

By Mr. Bloomberg:

Q. In each instance you signed a contract—one for the rental and one for the purchase of a machine?

A. Yes, sir.

Q. In each instance the contract had a clause in it saying that it was subject to the approval of the company, did it not?

A. I don't recall that. Mr. Grubbs said it would have to be submitted to the company and receive the approval of the company.

Q. Did you receive an invoice from the company?

A. I did for the purchase.

Q. Did you receive that directly from the home office?

A Yes, sir, I think it was directly from the home office.

Q. Did you receive any bill from the home office for the rental of the machine.

A. I don't recall about that.

Q. You would not say positively whether you did or not??

A. No, sir, I wouldn't say positively whether I did or not, without going through my files and seeing whether I can find that.

NOTE.—The witness then stood aside, and afterwards returned and stated that he had searched his records and could find no approval of the rental contract.

Testimony closed.

72 The stipulations and affidavits referred to in the opening statements of counsel are as follows:

Before the State Corporation Commission of Virginia.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission

v.

THE DALTON ADDING MACHINE COMPANY.

Stipulations.

It is stipulated and agreed by and between the above parties, by their counsel, that there may be used and treated as evidence upon the trial and hearing of the above entitled cause, and upon all proceedings or appeals that may be had in the above entitled cause, the affidavits taken on behalf of the complainant and the defendants in a case heretofore pending in the District Court of the United States for the Eastern District of Virginia, entitled The Dalton Adding Machine Company, Complainant, v. The State Corporation Commission of the Commonwealth of Virginia, Robert R. Prentis, William F. Rhea and J. Richard Wingfield, members of said Commission, Defendants, in equity No. 88, as follows:

The a-davit of Harry C. Grubbs, dated December 18, 1912;
The affidavit of James L. Dalton, dated December 26, 1912;
The affidavit of Robert R. Prentis, dated January 23, 1913;
The affidavit of Richard T. Wilson, dated January 23, 1913;

together with the contracts and matters of that kind copied as exhibits with the said affidavit;

The affidavit of J. H. Lawder, dated January 23, 1913;
The affidavit of James L. Dalton, dated January 31, 1913; and
The affidavit of Harry C. Grubbs, dated January 31, 1913.

It is further stipulated and agreed between the parties hereto that wherever in said affidavits the term "complainant" is used or referred to it may be considered and treated in this suit or proceeding as referring to the defendant, and that wherever the term "defendants" appears or is used it may be considered and treated in this suit or proceeding as referring to the complainant; and that wherever the "bill of complaint" is referred to it may be considered and treated in this suit or proceeding as referring to the

73 answer of the defendant.

It is further stipulated and agreed that the reference to the orders or proposals to purchase machines referred to as appearing in paragraph 2½ of the bill of complaint, shall be understood and treated in this suit or proceeding as referring to paragraph 5 of the answer herein; and that any other references to specific paragraphs in the bill of complaint may be understood and treated as referring to the appropriate paragraphs where the same matter appears in the answer.

It is further stipulated and agreed that in addition to the affi-

davits above mentioned, each of the parties hereto reserves the right and privilege of offering such other or further testimony as such party may desire or be advised.

C. B. GARNETT,
Assistant Attorney-General of Va.,
Counsel for Complainant.
THOMAS A. BANNING,
HAROLD S. BLOOMBERG,
Counsel for Defendant.

Affidavits.

District Court of the United States for the Eastern District of Virginia.

THE DALTON ADDING MACHINE COMPANY, Complainant,
v.
THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF Virginia, Robert R. Prentis, William F. Rhea, and J. Richard Wingfield, Members of said Commission, Defendants.

In Equity. No. 88.

STATE OF VIRGINIA,
Henrico County, ss:

Harry C. Grubbs, being duly sworn, on oath deposes and says: I am 27 years of age. I am engaged in soliciting orders or proposals for Dalton Adding Machines, manufactured by the Dalton Adding Machine Company of Poplar Bluff, Missouri. I have an office at No. 22 North Seventh Street, Richmond, Virginia.
74 The territory in which I solicit orders or proposals comprises the entire State of Virginia, and in my work as a salesman or solicitor I travel from place to place in the State of Virginia soliciting orders for the Dalton machines. The office that I have rented is by myself and not by the Dalton Adding Machine Company, and the rent for such office is paid by me and not by the company. The lease runs to me in my own name and not to the company, nor is the company mentioned therein. The office furniture belongs to me and not to the company. I pay the telephone rent myself and all of the expenses of running and conducting such office, including my assistants to aid me in soliciting the sale of machines. I receive no salary or fixed compensation from the company, but am paid simply a commission on the sale of machines effected through the solicitation of myself or my assistants. Nor are my assistants paid any salary or commission by the company, but look to me entirely for their compensation, which is in the form of a sub-commission that I allow them on the sale of machines effected through their solicitation.

I have no authority from the company to make a sale of an adding machine or to convey title to a machine and have never sold a Dalton adding machine in the State of Virginia, but have

only authority to solicit offers or proposals to purchase such machines wherever I find an individual or company desirous of purchasing the same. In every instance where I have been able to secure an offer or proposal for the purchase of a machine I have had the prospective purchaser sign a printed blank like those set out at length in paragraph 2½ of the bill of complaint in the above entitled cause, with the exception of a few machines purchased by railway companies, which have their own printed orders or requisitions which they prefer to sign. In every instance, however, including the railway companies, the orders or proposals to purchase a machine are taken subject to the approval of the Dalton Adding Machine Company and are sent by me to the company through the mails to its home office in Poplar Bluff, Missouri, for approval and acceptance. In no case is a sale effected or a transfer of title to or ownership in the machine made or consummated until the company has approved and accepted the order at its home office in Missouri. There has been no deviation or departure from this method of selling the company's product or machines, but the same has been strictly adhered to by me and my assistants since I have opened my office and engaged in the business of soliciting offers or proposals for the purchase of Dalton adding machines in the State of Virginia. I have carefully considered the statements as to the method employed by the Dalton Adding Machine Company of soliciting orders or proposals and effecting sales of its products or machines contained in paragraphs numbered 2, 2½, 3, 4 and 5 of its bill of complaint herein and am able to say of my own knowledge that the method set out in such paragraphs so far as relates to the sale of Dalton adding machines in the State of Virginia is concerned, is in accordance with the facts, and I refer to such paragraphs for a fuller and more detailed statement of the method of carrying on my work as a solicitor or salesman in the State of Virginia.

I began my work as a solicitor or salesman for Dalton adding machines in the State of Virginia and opened my office on or about the first day of February, 1912, and pursued such work in the way above explained and in no other from the beginning. During the first part of the month of August, 1912, and along about the 10th or 12th of such month, one Richard T. Wilson called at my office, No. 22 North Seventh Street, Richmond, representing himself as the clerk of the State Corporation Commission of the Commonwealth of Virginia, and stated that he called on behalf of such Commission and desired to see me in reference to the company's right to do business in the State of Virginia, as I was informed upon my return to the office, having been out when Mr. Wilson called. I was told that Mr. Wilson desired me to call at the office of the Commission, and I did so that same afternoon, but did not find him in. I called the next morning and found Mr. Wilson in. I explained to Mr. Wilson the method on which I was doing business as explained above and insisted that we were doing, by which I meant not merely myself, but the company also, a strictly interstate business, as the

company had been doing for several years in other states and that in no instance as I understood had the company been required to pay any entrance fee or to procure a license for carrying on its business as it was being carried on in Virginia. Nothing decisive was settled at this interview.

The call of Mr. Wilson at my office and the general interview that I had with him as above caused me to make some investigation and to make some inquiries to enable me, if possible, to determine whether there was anything in my method and the company's method of securing sales of machines in Virginia
76 which could render either myself or the company liable under the laws of Virginia relating to foreign corporations, and I became satisfied that neither myself nor the company was doing anything that we did not have a perfect right to do. Thereupon I again called upon Mr. Wilson and had a second interview with him at his office. At this interview he insisted that in his view I was not complying with the law of Virginia, and he requested me to write him a letter setting forth the method pursued by myself and the company, and I told him that I would refer the matter to the company for consideration and attention. This interview, like the first, resulted in settling nothing, but left the matter as it was before, except that I promised to refer the matter to the company, and he stated that he would take it up with the Commission.

In accordance with my promise I wrote the company at its home office in Missouri, explaining the situation. Since which time the matter has been conducted by others and I have not personally had charge of it.

I desire to say that the Dalton adding machine is comparatively a new machine and that it was practically unknown in the State of Virginia prior to the beginning of my work soliciting orders or proposals to purchase it. I believe, in fact, that less than half a dozen machines were in use in the State of Virginia at the time I opened my office and began my work of soliciting orders or proposals to purchase machines. In my work of solicitation I have visited a good many different places in Virginia to seek orders or proposals for the machines and in practically every instance I have found that the machine was unknown even by name. In order to secure offers or proposals to buy a machine I have found it necessary to show the machine to parties needing one and explain its construction and operation, as in no other way could I interest them in the machine or secure an offer or proposal to purchase one. In some cases the only way in which an order or proposal could be secured was to allow the prospective purchaser to have a machine for a limited period to try the same to determine whether it was suitable to the requirements of his business. In these cases it was also necessary for me to teach a clerk or employee how to operate the machines, explain its capacities for doing the work of his employer's business, and matters of that kind. Allowing the prospective purchaser the privilege of testing or trying a machine was a necessity in a number of cases, as otherwise it was impossible to

secure an offer or proposal for its purchase. In fact, when I
77 endeavored to secure an order for a machine from the City of Richmond, the city authorities having the matter in charge required such privilege.

After a prospective purchaser had had a machine for a few days or a limited period for the purpose of trying and testing it and becoming familiar with its operation, and had decided to sign an offer or proposal to buy it, such offer or proposal designated and described the machine that he was offering to buy by its serial number, style or model, and capacity, so that the particular machine which he was offering to buy was segregated and distinguished from all other machines so that the proposal or offer when approved and accepted by the company in Missouri operated as a sale of that particular machine and no other.

HARRY C. GRUBBS.

Subscribed and sworn to before me this 18 day of December, 1912.

CHAS. E. GARRETT,
Notary Public.

Commission expires Apr. 27, 1915.

District Court of the United States for the Eastern District of Virginia.

THE DALTON ADDING MACHINE COMPANY, Complainant,
v.
THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF Virginia, Robert R. Prentis, William F. Rhea, and J. Richard Wingfield, members of said Commission, Defendants.

In Equity No. 88.

STATE OF MISSOURI,
County of Butler, ss:

James L. Dalton being duly sworn, on oath deposes and says:

I am president of the Dalton Adding Machine Company, which company is incorporated under the laws of the State of Missouri. Such company was organized or formed on or about the 8th day of July, 1903, "to manufacture and sell Adding Machines, Typewriting Machines, Adding and Writing Machines Combined, Cash Registers
and all Attachments and Appliances thereof," to quote the
78 language of its charter defining its purposes or objects. Since the organization of the company, and for some five years last past, it has been engaged in the actual work of manufacturing and selling adding, listing and calculating machines, together with the necessary appliances for use therefor and therewith, and selling the same throughout the various States of the United States and in many foreign countries. In short, the company has been doing and is now doing a widely extended business in the sale of such

machines between its home State of Missouri and other states and foreign countries.

I have read the bill of complaint in this case and have informed myself as to its various statements and allegations. They are all substantially, and I may say literally, true and in accordance with the facts. The method of carrying on the business of the Dalton Adding Machine Company is as is set out and described in such bill of complaint. The company carries on its business and sells its machines at its home office in Missouri, which sales are effected through the solicitations of salesmen, solicitors, or "drummers," as they really are, in the various states of the United States. None of the salesmen or solicitors are authorized nor do they have the power to make a sale of a machine, but only to solicit an offer or proposal to buy the same wherever they can find a party, firm or company desirous of purchasing the same, which offers or proposals are always taken subject to the approval and acceptance or rejection of the company at its home office in Missouri, and are approved and accepted or rejected and refused according to the circumstances of each particular application to buy a machine, as the same may appear, from financial or other considerations, to be advisable, or otherwise. I refer to the bill of complaint herein for a general and detailed statement of the method which the company has always pursued in carrying on its business.

Early in the year 1912 the company authorized one Harry C. Grubbs to solicit offers or proposals for the purchase of its adding machines in the State of Virginia. In pursuance of such authorization the said Grubbs established his headquarters at Richmond, Virginia, and opened an office there at No. 22 North Seventh street. The company did not rent an office either for itself or for its solicitor in Virginia, nor has it ever had an office or place of business in Virginia. The office opened by the said Grubbs was rented by himself and on his own responsibility. The rent for such office
79 is paid by the said Grubbs and not by the company. In like manner the office furniture was purchased by the said Grubbs and belongs to him and not to the company. The said Grubbs is not paid any fixed salary or compensation by the company, but only a commission upon sales effected through his efforts and solicitations. Nor does the company hire or pay any one employed by the said Grubbs to assist him in soliciting orders or proposals for its adding machines. He employs such assistants himself and is liable to them for the payment of such commissions or compensation as he may have agreed upon between himself and them. The said Grubbs has no authority, and never has had any authority to sell or convey the title to the company's adding, listing and calculating machines, but only authority to solicit orders or applications, to buy the same, which have always and in every instance been transmitted through the mails to the company's home office in Missouri for approval and acceptance or rejection. No change of ownership or transfer of title is or has been effected until after the order or proposal for the machine has been approved and accepted by the company at its home office in Missouri. The proposals or ap-

plications to buy machines have always contained a provision that they are subject to the approval of the company, and they have never become effective until after they have been received and approved by the home office of the company in Missouri. The contract of sale is a transaction between the purchaser in Virginia and the company in Missouri, and the work and function of the salesman or solicitor Grubbs has been to solicit, drum up and procure offers or applications for the purchase of the machines. He is authorized to solicit parties to purchase the company's machines anywhere throughout the State of Virginia, and in the prosecution of his work of solicitation he has traveled and does travel throughout the State soliciting orders or proposals to buy machines in various places. In short, the business of the said Grubbs is in reality that of a traveling or itinerant "drummer" maintaining his headquarters at Richmond, but traveling from place to place throughout the State. His compensation is simply a commission paid to him on such sales as he and his assistants working under him and at his own expense, and not at the expense of the company, are able to effect and procure. All money paid by purchasers of machines is sent to the home office in Missouri, and all commissions are paid to said Grubbs from the home office as collections are received by the company from time to time.

80 At the time the Dalton Adding Machine Company was organized, and at the time it began to manufacture and sell machines, the adding, listing and calculating machines which it began to manufacture and which it has been manufacturing were a new and unknown type of machine, differing radically in construction and operation from all other adding machines then or now on the market. It was an unknown machine and a demand had to be created for it by educating the public interested in such machines as to its peculiarities of construction and modes of operation. At the time the company authorized the said Grubbs to enter upon the work of soliciting orders or proposals to buy the machines in Virginia, there were probably less than half a dozen of the company's machines in use in the State of Virginia. It was practically, not to say literally, unknown in Virginia even by name. In Virginia, as eleswhere, owing to the fact that the company's machines were unknown, either as to name, construction or operation, it was necessary, in order to procure offers or proposals to purchase the machines, that the prospective purchasers should be shown the machine and given an opportunity to have it demonstrated to them, and to have their clerks, bookkeepers or employees become acquainted with its mode of operation, so that they could use it in the business of their employers. It was necessary, furthermore, for prospective purchasers to become satisfied that the machines were adapted to the peculiar requirements of their business and were superior in construction and operation to other makes of adding, listing and calculating machines which were on the market and sold in competition with the company's machines. No other practical way existed for introducing the machine and enlisting an interest in the same on the part of firms, companies or corporations

having a need for such machines. It was not practical, nor, I may say, possible, to secure orders for machines by simply advertising the same, sending circulars or other descriptive literature, or writing letters to parties that might be considered as possibly having use for such machines. Owing to the nature and peculiarities of the machines, it was necessary that parties should see and be given an opportunity to examine, try and test the same. In order, therefore, for the company to secure orders or applications to purchase the machines in Virginia, as in other States, it has been necessary for the company to ship machines to Virginia and to other States, for the purpose of sale and in advance of procuring orders or proposals to buy the same. In every case, however, the
81 machines were shipped to Virginia for the purpose of effecting a sale of the same, and, to enable the company to secure offers or proposals to purchase, it was and is necessary, in many cases, to allow the prospective purchaser an opportunity to test and try the machine so as to become familiar with its construction and operation and to appreciate its adaptability to the requirements of his business, as well as its superiority to other machines which were being sold in competition with it. To this end, therefore, wherever necessary in order to procure an offer or proposal to buy the machine, a prospective purchaser was allowed to test or try it for a few days or for a limited period, but such testing or trying in every case was for the purpose of creating a demand and procuring an order or application for the purchase of the machine, for which purpose and object it had been shipped into the State of Virginia. After an order or proposal was procured, as above explained, and as explained in the bill of complaint and in the affidavit of Harry C. Grubbs herein, the prospective purchaser, in case his application to buy the machine was accepted, was either shipped a machine direct from the factory of the company in Missouri, or, where he preferred, he was allowed to retain the machine (delivered to him) for the purpose of sale, and which he had been permitted to test and try, and with which he had become familiar, but in such cases the proposal or offer to buy the machine described it by serial number, capacity or style, so that the machine which he purchased was segregated and distinguished from all other machines in the proposal which, upon the approval and acceptance of the company, became a contract of sale for the particular machine described in it and for no other machine whatsoever. In those cases where a machine was shipped to the purchaser direct from the company's factory in Missouri, such machine took the place of the one which the purchaser had tested and tried.

The method of selling the Dalton Adding Machine Company's machines in Virginia has been the same as the method carried on by the company in other States since it began marketing its machines. It has been what I and the other executive officers of the company considered to be simply and strictly an interstate business. In several instances the Corporation Commissions or officials of other States have made inquiries and have investigated the method

by which the company was effecting sales of its machines in
82 such respective States, but in every instance, after having been informed of the method adopted and pursued by the company, it has been permitted to proceed with its business without interruption, molestation or interference. The company has been able in every instance to satisfy the State Commissions or State officials of other States that it was doing simply an interstate business, if I may judge from the fact that such commissions and officials have, in every instance, after ascertaining the method pursued by the company for effecting the sale of its machines, dropped their claim of liability and permitted the company to continue its business as it had been doing. Yet, in each of such cases, the company's business was being carried on precisely, in every respect, as it is being carried on in the State of Virginia. The company's machines were beng shipped into the States for the purpose of sale; solicitors or salesmen were drumming up and procuring offers or proposals to buy the same; prospective purchasers were being allowed to test or try the machines; and in many cases, after offers or proposals had been secured and accepted and approved by the company at its home office in Missouri, the purchasers were allowed to retain the machines which had been exhibited to them, and which they had tested or tried and had at their place of business at the time they signed the order or proposal to purchase the same.

When the question arose as to the company's method of doing business in the State of Virginia, the matter was referred to the company by its salesmen or solicitor Grubbs, and I had some correspondence with Mr. Wilson, the clerk of the State Corporation Commission of the Commonwealth of Virginia, in reference to the matter, in which I explained the company's method of effecting sales in Virginia, and I explained to him that perhaps thirty per cent (30%) of the machines sold in the State of Virginia were machines that had been already shipped in and tested and tried by the prospective purchasers, as above explained. This letter of explanation to Mr. Wilson was dated August 16, 1912, and in my letter I suggested that I would be glad to have the views of our counsel considered by the Commission, as I felt confident that the company was doing nothing that rendered it amenable to the laws of Virginia relating to foreign corporations, and nothing that we were not fully authorized to do as a foreign corporation doing an interstate business. I received a reply to this letter and then referred the mat-
ter to the company's counsel, Mr. Banning, who thereupon
83 had some correspondence with Mr. Wilson and with the chairman of the Commission, Mr. Prentis, which correspondence was submitted to me, so that I was kept advised of the same. This correspondence, however, failed to induce the Corporation Commission to withdraw its claim against the company, and in a letter written the company's counsel, Mr. Banning, the chairman of the Commission, Mr. Prentis, under date of October 1, 1912, said:

"We feel, therefore, that our duty to the State requires us to proceed against the Dalton Adding Machine Company, of Poplar

Bluff, Missouri, for the purpose of enforcing the demand that it comply with the laws of Virginia applicable to foreign corporations doing business in this State.

"We will not, however, take any legal step for ten days from this date, and still trust that it will be unnecessary to do so. We have no desire to be arbitrary, but simply cannot agree with you in your legal conclusions."

Although the letters written by the chairman of the Commission, Mr. Prentis, were couched in such courteous language as I should expect from a gentleman of his standing and position, yet it appeared to the company that there was imminent danger, not to say positive certainty, that proceedings were about to be commenced against the company to impose the penalties provided by the corporation laws of Virginia on foreign corporations doing business in the State of Virginia, which I considered that the company was not doing, nor in any sense doing a domestic business, nor any business that was not guaranteed to it under the commerce clause of the Constitution of the United States, and that there was imminent danger, not to say positive certainty, that the company would be put to trouble, annoyance, expense and irreparable damage by the proposed proceedings on the part of the State Corporation Commission of the Commonwealth of Virginia, unless the company immediately complied with its demand to enter the State of Virginia under its corporation laws, pay the entrance fee required, and in other respects pay the fees and comply with the requirements of the State Corporation laws authorizing foreign corporations to do or carry on a domestic business in the State of Virginia. The company did not have and never has had any office in the State of Virginia for corporate or other purposes, and never did a domestic business in the
84 State of Virginia, as I believed and still believe. Notwithstanding the courteous tone in which the Commission formulated its demands and requirements, I considered and still consider that it was threatening to interfere with our business as a foreign corporation carrying on an interstate business authorized and justified under the commerce clause of the Constitution, and I have no doubt that the Commission would have proceeded against the company had not the bill in this case been filed for the purpose of securing judicial consideration and determination by this court of the company's method of securing sales of its machines in Virginia, and an adjudication of its rights as they may appear on a hearing of this cause.

I have read the affidavit of Harry C. Grubbs made herein, dated December 18, 1912, as to the nature of the work that he has been doing in Virginia, in soliciting orders or proposals for the purchase of Dalton adding machines, etc., and am able to state of my own knowledge that his statements in reference to such matters are true, as they coincide with my own knowledge respecting the same.

JAMES L. DALTON.

Subscribed and sworn to before me this 26th day of December, 1912.

[SEAL.] B. C. HARRISON,
Notary Public.

Commission expires April 18, 1916.

District Court of the United States for the Eastern District of Virginia.

THE DALTON ADDING MACHINE COMPANY, Complainant,
vs.
THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA, Robert R. Prentis, William F. Rhea, J. Richard Wingfield, Members of said Commission, Defendants.

In Equity, No. 88.

STATE OF VIRGINIA,
City of Richmond, ss:

Robert R. Prentis, being duly sworn on oath, deposes and says: That I am chairman of the State Corporation Commission of
85 Virginia, *as* as such in the discharge of what I conceived to be the proper discharge of my official duties I wrote two letters to Thomas A. Banning, Esquire, counsel for The Dalton Adding Machine Company. Inasmuch as Mr. James L. Dalton, in his affidavit filed in this cause, quoted a part of one of those letters, I feel that it is proper that both of the letters should be read as a part of the evidence upon the pending motion in this cause. This is a copy of the letter in full written to Mr. Thomas A. Banning, on September 12, 1912:

September 12th, 1912. *rrp-w*

Thomas A. Banning, Esq., of Banning and Banning, Counselors at Law, The Marquette Bldg., Chicago, Ill.

MY DEAR SIR: Your letter of August 24th, addressed to the Clerk of this Commission, discussing the obligation of the Dalton Adding Machine Company, of Poplar Bluff, Missouri, to pay the fees required of foreign corporations doing business in Virginia, has been referred to me.

I will not attempt to follow you in your complete and thorough discussion of the cases as you construe them. My own idea is that the Supreme Court of the United States has settled all of the principles involved, and that hence it is unnecessary to consider cases from time to time decided by the State courts or the inferior Federal courts.

I cannot agree with you in your conclusions so far as they affect the question at issue, though there is much in your letter which I would not think of contesting, because you are fully sustained by the cases.

I do not think that the "original package cases" help to solve the question, because they are cases arising under State statutes absolutely forbidding dealings in certain commodities, which the courts have construed to be an undue interference with interstate commerce.

It may be regarded as fully settled that a foreign corporation may not do local business in a State without the consent of that State, and

that having the absolute power of excluding the foreign corporation a State may impose such conditions upon permitting it to do business within its limits as the Legislature may judge expedient. The Horn Silver Mining Company vs. New York, 143 U. S. 305, and
86 Pembina Consolidated Silver Min'g, etc., Co. vs. Pennsylvania, 125 U. S. 181. Many other subsequent cases could be referred to as fully sustaining this doctrine, which is so well established that I feel sure you will not deny it.

The question here involved is whether the Dalton Adding Machine Company is doing business within the State of Virginia. By doing business of course I mean doing business which is not protected by the commerce clause of the United States Constitution. We do not, of course, contest the right of that company to do interstate business within this State. Under the facts stated by the company, however, we insist that the company is doing a local business which is not interstate commerce. The company is shipping its machines into this State as its own property as samples, to be exhibited and tested by persons who may thus be induced to purchase similar machines from the company, and if this were all the company did the State of Virginia would certainly have no right to impose any tax or condition upon the corporation, and it is useless to cite cases to sustain this proposition. It appears, however, that the compay is not content to do this, but that it undertakes, after such machines have been brought into this State, ostensibly as samples and merely in aid of its interstate business, to sell these identical machines to purchasers in Virginia, the entire contract of sale being made and completed after the machines have been brought into this State. So usual is this method of transacting the business that it is admitted that thirty per cent of the machines sold in Virginia are thus sold after they have been brought into this State. Such contracts of sale, even though made on the seller's part at the home office of the company, are certainly Virginia contracts and governed by Virginia laws. The subject of the contract is in Virginia, that is, the machine, the assent of the purchaser is given in Virginia, and the machine is delivered in Virginia. It is a matter of no consequence how much or how little local business the corporation does in Virginia, for it can do no business in Virginia except that protected by the commerce clause without the assent of the State. I think that the cases of Armour Packing Company against Lacy, 200 U. S., page 225; Kehrer vs. Stewart, 197 U. S., page 60; Hopkins vs. United States, 171 U. S., page 578; and the American Steel & Wire Company vs. Speed, 192 U. S., page 500, are ampl authority to sustain the view which I have herein expressed.

The question is not a new one to me, for I have had occa-
87 sion to consider it in all its phases many times during the past five years, and views similar to those which I have here expressed have been accepted by some of the largest corporations in the country under competent legal advice. Of course, I recognize the fact that there are some very nice and narrow distinctions here involved, and that it is not a difficult matter for a foreign corporation to transact its business so as to avoid all State exactions, but

there is a limit which it cannot overstep. As above indicated I think that the Dalton Adding Machine Company has done and is doing a local business in this State, and it is the duty of this Commission to see that the requirements of the State laws are complied with. I trust that upon further reflection you will recognize the soundness of the views which I have expressed.

Very truly yours,

ROBERT R. PRENTIS, *Chairman.*

And this is a copy of the letter in full written to Mr. Thomas A. Banning on October 1st, 1912.

October 1st, 1912, *rrp-w.*

Thos. A. Banning, Esq., of Banning and Banning, Counselors at Law, The Marquette Bldg., Chicago, Ill.

My Dear Sir:—I have your favor of Sept'r 24th, referring to the business of the Dalton Adding Machine Company in Virginia.

I am very glad to note that you are a grandson of Virginia and that you have not forgotten the rock-ribbed hills of Rockbridge County.

It will give me very great pleasure to see you in Richmond if you determine to come this way on your journey to Alabama.

I do not, however, think that such a visit to the Commission will change our views with reference to the legal question involved and discussed in this correspondence. You have evidently reached your conclusion, after a careful study of the cases, and nothing that I can write or say is likely to change your opinion. I have reached an opposite conclusion from what I consider a sufficient study
88 of the principles involved, and think it unlikely that an interview with you will change my opinion.

We feel, therefore, that our duty to the State requires us to proceed against the Dalton Adding Machine Company, of Poplar Bluff, Missouri, for the purpose of enforcing the demand that it comply with the laws of Virginia applicable to foreign corporations doing business in this State. We will not, however, take any legal steps for ten days from this date, and still trust it will be unnecessary to do so. We have no desire to be arbitrary, but simply cannot agree with you in your legal conclusions.

With assurances of respect,

Very truly yours,

ROBERT R. PRENTIS, *Chairman.*

rrp-

If this chancery suit had not been instituted The Dalton Adding Machine Company would have been proceeded against under the laws of Virginia upon the allegation that it was doing business in Virginia in violation of the Virginia statute. In that proce-ding evidence would have been taken by the Commission, after due notice to The Dalton Adding Machine Company, in order to determine judicially whether or not The Dalton Adding Machine Company was violating the laws of this State. If that issue of fact had been

determined adversely to The Dalton Adding Machine Company that company would have had the right to appeal to the Supreme Court of Appeals of Virginia, and if that decision of that court had been likewise adverse the defendant company would have had the right to take the case upon writ of error to the Supreme Court of the United States for the determination of its legal right. It is possible, though not probable, that this Commission, upon the issue of fact thus raised, might have decided the case in favor of The Dalton Adding Machine Company, as the letters were not intended to prejudge the question, but were simply written in the discharge of what this affiant believed to be his administrative duty in connection with the admitted facts. These letters, written in reply to two letters written by Mr. Thomas A. Banning, counsel for The Dalton Adding Machine Company, constitute the whole of the correspondence between this affiant and the representatives of the complain-
89 ant company, and constitute the only basis for the allegations in the bill, and all allegations in the bill in conflict therewith are denied.

ROBERT R. PRENTIS.

Subscribed and sworn to before me this 23rd day of January, 1913.

SAM W. BIGGER,
Notary Public.

My commission expires on the 5th day of January, 1917.

District Court of the United States for the Eastern District of Virginia.

THE DALTON ADDING MACHINE COMPANY, Complainant,
v.
THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF Virginia, Robert R. Prentis, William F. Rhea and J. Richard Wingfield, members of said Commission, Defendants.

In Equity. No. 88.

STATE OF VIRGINIA,
County of Richmond, ss:

Richard T. Wilson, being first duly sworn, on oath deposes and says:

I am the clerk of the State Corporation Commission of Virginia. Having learned that the machines of the Dalton Adding Machine Company were being sold in the City of Richmond, I, in the discharge of my duty under Section 1104 of the Code of Virginia, instituted such inquiries as led me to the conclusion that that corporation should be required to comply with the Virginia law governing foreign corporations doing business in Virginia. Accordingly I visited the office of the company, upon the window of which is this

sign: Dalton Adding, Listing and Calculating Machines, and upon the door is the name of "H. C. Grubbs." I had the interview with Mrs. Jennie E. Grubbs, referred to in her affidavit heretofore filed in this cause. She states substantially what occurred except that I feel sure that I was polite and considerate and I certainly did not intend to say anything to unduly alarm her, or to do anything except to discharge my official duty in a polite and considerate manner. I supposed that she was the stenographer in charge of the office in the absence of her principal, and hence the proper person with whom to leave the message which I did leave. Mr. Grubbs subsequently called on me at the office and introduced himself by presenting the card which I herewith file as a part of this affidavit, marked Exhibit No. 1. My further investigation has developed the fact that the Dalton Adding Machine Company, through H. C. Grubbs, Virginia sales manager, has made two contracts with the Southern Bell Telephone and Telegraph Company of Virginia, copies of which are herewith filed and marked Exhibits Nos. 2 and 3. One of said contracts it will be noted is a contract for advertising the said corporation in heavy-faced type in the directory of the telephone company, the other being for telephone service at No. 22 North Seventh Street, Richmond. That supplies, consisting of ribbons, paper and miscellaneous supplies necessary and convenient to operate the Dalton adding machine are supplied from the office above referred to at No. 22 North Seventh Street, Richmond. That the contract under which the machines are sold guarantees the machines against defects of material and workmanship for two years and this necessitates the repair of such machines. That the contracts of the Dalton Adding Machine Company and its methods of doing business are substantially similar to the methods of the Burroughs Adding Machine Company, a foreign corporation, and with other foreign corporations operating in this State, which foreign corporations have complied with Section 1104 of the Code of Virginia. So far as I am advised no other corporation, other than the Dalton Adding Machine Company, transacting its business in this way has refused to comply with this section. I am informed that the personal property in the said office at No. 22 North Seventh street has been assessed for taxation against the Dalton Adding Machine Co pany and that tax has been paid for the year 1912.

R. T. WILSON.

Subscribed and sworn to before me on this 23rd day of January, 1913.

SAM W. BIGGER.

My commission expires on the 5th day of January, 1917.

91 (R. T. WILSON EXHIBIT No. 1.)

Phone: Madison 1017, "The Machine that does things."
Dalton Adding, Listing and Calculating Machines.
22 N. Seventh St.
H. C. Grubbs, Virginia Sales Manager, Richmond Va.

(R. T. WILSON EXHIBIT No. 2.)

Original.

Supplemental Contract. 9006.

(Heavy Face Type)

The Subscriber requests the Southern Bell Telephone and Telegraph Co. of Virginia, subject to his contract No. Mod 1017, with said Company, dated February 5, 1912, to list in its Directory in heavy face type, similar to that now used for "call numbers," his name and address, for which the subscriber agrees to pay, in addition to the amount named in said contract, Three Dollars Per Annum, in advance, from the date of the first publication.

This request may be terminated by thirty days' previous notice in writing to the Company from the Subscriber or from the Company to the Subscriber.

(Subscriber) DALTON ADDING MACHINE CO.
H. C. GRUBBS, *Va. Sales Mgr.*

Accepted May 8-1912 190 , by Southern Bell Telephone and Telegraph Co. of Virginia.

By A. S. TANNER.

May 20-1912. Wythe White, 5-8-12. May 8-12 Paid.

92 R. T. WILSON EXHIBIT No. 3.)

Original.

Contract for Message Rate Telephone Service.

The Subscriber requests the Southern Bell Telephone and Telegraph Company of Virginia (herein styled the "Company") to establish at 22 N. 7th St., in the City of Richmond, Va., a Special Line metallic circuit telephone station, maintain the same and the wires connecting it with the Company's Exchange, and furnish service to the Subscriber, his agents and representatives only, for one year from the first day of the month following the connection of the station, and thereafter until this contract is terminated as herein provided; and agrees to pay for such maintenance, etc., and the right to send in each calendar month One Hundred (100) local messages, Three dollars in advance and for additional local messages Three

cents each, for the fraction (if any) of the month in which the station is connected, or this contract is terminated, proportionately at said rate; and for foreign messages such tolls as are now or may be established, all of said payments to be made monthly. The Company agrees that when its charges, for said local messages, during any calendar month shall aggregate Seven Dollars ($7.00) no further charge shall be made for additional local messages during the remainder of said month.

The subscriber also agrees to pay — dollars, monthly in advance, for ——

A "Local Message" is a personal communication, five minutes or less in duration, from said station to another station connected with an exchange of the Company in said city; a "Foreign Message" is a personal communication, of such duration as is now or which from time to time may be established, from said station to a station connected with any exchange or toll line outside of said city. All words herein referring to the Subscriber shall be taken to be of such number and gender as the character of the Subscriber may require.

If the service is interrupted otherwise than by the negligence or wilful interference of the Subscriber a rebate at the monthly rate hereinbefore specified shall be made for the time such interruption continues after reasonable notice in writing to the Company, but no other liability shall, in any case, attach to the Company. The instruments and lines shall be carefully used only as herein stated, and no instrument or appliance not furnished by the Company shall be attached to or used in connection with them. For the purpose of inspecting, repairing or removing the instruments or line, the Company and its servants may have access thereto any reasonable hour.

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Either party may terminate this contract at or after the expiration of the first year by not less than 30 days' previous notice in writing to the other party. Upon the non-payment of any sum due, the abandonment of the station, or any violation hereof, the Company may, without notice, terminate the Subscriber's rights hereunder, sever the connection and remove the instruments.

This request becomes a binding contract when accepted by the Company's Manager, by his signature hereto, or by establishing the said station. The conditions on the back hereof are made a part of this contract, and its terms cannot be varied or waived by any representations or promises of any canvasser or other person, unless the same be in writing and signed by said Manager.

(Subscriber) DALTON ADDING MACHINE CO.
H. C. GRUBBS, *Va. Sales Mgr.*

Attest:
WYTHE WHITE.
1-31-12.

Accepted Feb 5-1912 191 by the Southern Bell Telephone and Telegraph Co. of Virginia.
Approved

—— ——
By A. S. TANNER, *Manager.*

I, J. H. Lawder, Dept. Com. Rev. City Richmond, left tax papers at No. 22 N. 7 for the Dalton Adding Machine Co., H. C. Grubbs, Mgr., on March 2nd, 1912, said papers had not been returned at the time of closing tax books for 1912, assessment of $200 value was placed against the firm, as I found about that amt. of value at time of leaving papers. Tax on the assessment has been paid to City Treasurer for 1912 by Dalton Adding Machine Co.

(S'g'd) J. H. LAWDER, *D. C. R.*

94 Subscribed and sworn to before me this 23rd day of January, 1913.

(S'g'd) ISAAC HELD,
Notary Public.

In the District Court of the United States for the Eastern District of Virginia.

In Equity. No. 88.

THE DALTON ADDING MACHINE COMPANY, Complainant,
v.
THE STATE CORPORATION COMMISSION OF THE COMMONWEALTH OF VIRGINIA, Robert R. Prentis, William F. Rhea and J. Richard Wingfield, Members of said Commission, Defendants.

STATE OF MISSOURI,
County of Butler, ss:

James L. Dalton, being duly sworn, on oath deposes and says:

I am the same James L. Dalton who gave an affidavit, dated December 26, 1912, on behalf of the complainant in this cause.

I have read the affidavits of Robert R. Prentis, Richard T. Wilson and J. H. Lawder, all dated January 23, 1913, on behalf of the defendants in this cause, and have acquainted myself with their contents.

The tax referred to in the affidavit of the Deputy Commissioner of Revenue Lawder as assessed against the property at the office of Grubbs, No. 22 N. Seventh Street, Richmond, must have been against the office furniture which belongs to Grubbs. The tax, if paid, must have been paid by Grubbs, as it was not paid by the complainant, and if it was assessed by the Commissioner in the name of the complainant, it was improperly assessed, and if it was paid in the name of the company, it was paid by Grubbs out of his own personal funds, and as his own personal obligation, as he has never asked to have it refunded to him, nor has it ever been refunded to him. From an examination of the complainant's books, I am able to state positively that the complainant has never paid any tax of any kind in Virginia, or has it paid Grubbs for any tax paid by him in Virginia. The complainant never heard of the tax referred to until receiving
95 the affidavits of Wilson and Lawder in which it is mentioned.

As to the card attached to the affidavit of Mr. Wilson, describing the salesman Grubbs as "Virginia Sales Manager," this was Grubbs' personal calling card, no doubt used by him in introducing himself to parties on whom he called to solicit the purchase of a machine from the complainant. It speaks of "Dalton Adding, Listing and Calculating Machines," but it nowhere mentions the name of the complainant, "The Dalton Adding Machine Company." It refers to the complainant's machines, and no doubt the salesman Grubbs, in the use of the cards referred to, desired to represent himself as the chief salesman or "Manager" of the sales of the machines in the State of Virginia. As already said, however, it was the personal business calling card of Grubbs and not the card of the complainant.

The copies of the contract and supplemental contract with the Southern Bell Telephone & Telegraph Company of Virginia, exhibited with Mr. Wilson's affidavit, appear on their face, and no doubt they are correct copies, to be signed "Dalton Adding Machine Co., H. C. Grubbs, Va. Sales Mgr." As stated in the affidavit of the salesman Grubbs, the telephone rent is paid by him and not by the complainant, either in whole or in part. The contracts referred to were made by him without the knowledge of the complainant. In fact, the complainant knew nothing about the contracts, nor how they were made, nor how they were signed, until copies of the same were exhibited with the affidavit of Mr. Wilson. I do not know why Grubbs signed the name of the complainant to the contracts, as he had not asked and had not received any authority to sign the name of the company to the contracts, but did so on his own motion or initative, and presume that his object in signing the contracts as he did, and particularly the one for the name of the company in the telephone directory, was that he thought it would facilitate his work of soliciting orders for the company by thus advertising it. But, however that may be, the making of the contracts was not the act of the complainant and they were not made by its authority or with its knowledge or consent.

As to the statement in the affidavit of Mr. Wilson to the effect that ribbon, papers and miscellaneous supplies are supplied from the office of the salesman Grubbs, I have to say that these things are a mere bagatelle and trifle compared with the sale of complainant's
96 machines. The complainant is not in business for the sale of rolls of paper or ribbons of such things, but for manufacturing and selling its adding, listing and calculating machines. The purpose and object of its business existence and activity is the manufacture and sale of machines. However, for the convenience of the users of its machines, and as a mere incident to its main business of selling machines, it supplies its salesmen with a few inking ribbons and a few rolls of paper, so that when the user runs out of one or the other he can be immediately supplied without being required to wait until the same can be shipped to him from the factory in Missouri. Even in this case, however, the furnishing of the supplies to a customer by the salesman is reported to the office in Missouri, and the bill for the same made out and sent from the home office. I may say that this is the first time that the defendants have mentioned

or complained of this matter, as heretofore and until the filing of Mr. Wilson's affidavit, all specified grounds of complaint have related to the sales of machines, presumably because the supplying of rolls of paper and ribbons to customers has been a mere incident to the main business of selling machines, and because it was trifling in amount and was done for the convenience and accommodation of purchasers of machines, and not as a matter of profit to the complainant. Indeed, there has been no attempt on the part of the complainant to make a profit in this matter, or to do more than cover the expense of furnishing the supplies to the purchasers and users of its machines, as it depended upon that phase of the business for its profits.

To show that the complainant fully explained its method of doing business to the defendants, and had endeavored in good faith to avoid litigation, and had sought to satisfy the defendants that its business was purely interstate business, I will quote from a letter that I wrote Mr. Wilson, secretary of the Corporation Commission, on August 16, 1912. In that letter, written on behalf of the complainant, I said:

"The Dalton Adding Machine Company is a Missouri corporation, manufacturing and selling adding machines, which it ships into other states, and for that matter into all parts of the world, to all responsible parties who may order them. It maintains no branch offices anywhere. In fact, the only office that we have is the one here at Poplar Bluff.

"We do give certain salesmen the exclusive right to solicit orders for our machines in certain prescribed territories. These
97 sales agents, as we term them, usually rent an office in some central point in their territory, which they pay for out of their own funds, and from that office, which they make their headquarters, they solicit orders for Dalton Adding Machines, which orders are always taken subject to the approval of the company at Poplar Bluff, and in no instance are they binding until they have been thus approved. In order that you may familiarize yourself with our orders, I am herewith enclosing the two forms that we use.

"When an order has been received at this office and approved by the proper department, an invoice is mailed to the customer and the machine shipped direct from here to fill the order, except that in some instances the orders sent in by our salesmen specify the particular sample machine which the purchaser at the time has on trial. Without taking the trouble to go through the records, I feel safe in saying that the orders sent in by salesmen specify the particular machine on trial in about thirty per cent of the instances where sales are made.

"Now getting down specifically to the situation in your own state: Mr. H. C. Grubbs has the exclusive right to solicit orders for our machines in that territory. His only compensation consists in commissions that he receives on sales made by him in his territory. He is not our agent in any sense of the word, as no authority is given him to even sell a sample machine and receive the cash for it without first submitting the order to this office for approval.

"The office which Mr. Grubbs occupies is rented on his own personal account, and paid for out of his own personal funds. He is a citizen of your state and votes and pays taxes there.

"We are anxious to obey the laws of your state as well as the laws of every other state, and in view of the fact that our business is strictly interstate, and in view of the further fact that we do not maintain an office or branch office elsewhere than in Poplar Bluff, Mo., and in view of the still further fact that no one outside of the City of Poplar Bluff, Mo., has authority to represent the company in any capacity other than solicit orders subject to its approval at its home office, we do not believe that we are doing business in your state in the meaning of the statute."

The order blanks referred to in my letter to Mr. Wilson were similar to the two for cash and time sales set out in para-
98 graph 2½ of the bill of complaint herein.

In the letter from which I have quoted above, I also informed Mr. Wilson that we had had similar claims made by the corporation authorities of other states, but after explaining to them our methods of doing business, they had in every instance conceded that our business was purely interstate business and had refrained from troubling us further. I also suggested that I would like an opportunity for our counsel, Mr. Banning, to submit a brief on the subject if the Commission still considered that we were in any way amenable to the statutes of Virginia.

In reply to my letter above, Mr. Wilson, under date of August 19, 1912, on behalf of the Commission, wrote me as follows:

"We have your letter of August 16th explaining the method of your corporation in carrying on its business in this state, and I beg to advise you that we have had very considerable experience as to matters of this character in connection with our statute, and we feel that your explanation is not satisfactory.

"The fact that you indicate that as much as 30 per cent of the machines sold in this state have been previously shipped into this state without being sold and are delivered by your representative directly after he makes the sale, indicates, we think, that your corporation is violating section 1104 of the Code of Virginia, and is going beyond any authority vested in it by the commerce clause of the Federal Constitution.

"We are always open to enlightenment, and shall be very glad to have the brief prepared by your counsel, though we presume it is a matter that has been gone over time and again in this office."

In reply to the above letter from Mr. Wilson, I again wrote him, on August 21, 1912, and among other things said:

"As I stated in my previous letter, we want to obey the laws, not only of your state, but of every other state in the Union, and when Mr. Banning has had an opportunity to study your laws in connection with the Federal Statutes applying to Interstate Commerce, he will advise us fully as to whether or not our plan of business is in violation of your law. If he advises that we are violating the Virginia laws, you may be sure that we will at once proceed
99 to settle with you in accordance with such plan as may be mutually agreed upon.

"If it is a violation of the Virginia laws for the Dalton Adding Machine Company to sell at its Poplar Bluff, Mo., office an adding machine which at the time of the sale is in an office of a citizen of your State, then there is no doubt but that we have violated your laws, for, as I stated in a previous letter, about 30 per cent of our sales are made in this way. Of course, your attorneys in construing a sale of the kind above mentioned, will not overlook the fact that sale of this particular machine is really made in Poplar Bluff. In other words, Mr. Grubbs, who represents us in that section in the matter of soliciting orders for our machines, has no power to sell even one of his sample machines for the cash and deliver a perfect title thereto. His only powers are to solicit and send in orders subject to the approval of this company, and when the orders are received the machines are invoiced from here and checks are all made payable here. It he should sell a machine and receive the full purchase price for it in cash, he could not deliver a title, and this company would have a perfect right to demand the return of its machine, provided it went into the hands of an objectionable party, under such conditions as those herein mentioned."

After the above correspondence, our counsel, Mr. Banning, took up the matter, and on August 24, 1912, wrote Mr. Wilson submitting a brief, and this resulted in the correspondence between him and Mr. Prentis, the chairman of the Commission, during which the two letters quoted in the affidavit of Mr. Prentis were written by him to Mr. Banning.

It was only after the complainant had exhausted every effort to satisfy the defendants that its business was a legitimate and constitutional one, and after it became evident that proceedings would be commenced by the defendants, as stated in the letter of Mr. Prentis of October 1, 1912, that the complainant felt that the filing of the bill in this case was necessary to protect it in its constitutional rights and save it from the irreparable loss and injury that it felt would follow the almost certain result of the proceedings which the defendants were threatening to institute. After reading the affidavit of Mr. Prentis I am more than ever satisfied that the complainant was fully justified in taking the initiative and filing the bill bringing the matter directly into the cognizance of the Federal courts.

100 I note that Mr. Wilson, in his affidavit, refers to the fact that the Burroughs Adding Machine Company has taken a license, or entered the State of Virginia under its corporation laws, and that he says that the business of that company is conducted on substantially the same lines as is the business of the complainant. While I regard this as a wholly immaterial matter, yet I think it well to state that my understanding of the way the Burroughs company conducts its business in Virginia does not agree with the understanding of Mr. Wilson. From my position as president of the complainant company, since its organization, I have become very familiar with the manner in which the Burroughs company conducts its business, as we have come into competition with the Burroughs machine in hundreds of instances, in Virginia and throughout the United States generally. I have been informed,

and I understand and believe it to be the fact, that the Burroughs company has a regular and established place of business at Lynchburg, Virginia, if I recollect the name of the place correctly, in charge of a regular, responsible, salaried agent or manager, under whose authority and direction the business is conducted in Virginia; that such place of business constitutes the headquarters or distributing point where a stock or supply of machines is kept constantly on hand; and that the salesmen or agents of the Burroughs company are authorized to and do make sales in Virginia from the headquarters or supply depot, without being required to transmit or refer the orders or proposals to purchase a machine to the home office of the company in Detroit, Michigan, so that the transaction in every case of a sale in Virginia is a completed and consummated transaction, in which the title to the machine passes by the act of the selling agent, without being required to be first approved and accepted in Michigan, so that there is wholly lacking in the transaction the element of interstate negotiation and contract, which circumstance wholly differentiates the method of business employed by the Burroughs company from that employed by the complainant.

JAMES L. DALTON.

Subscribed and sworn to before me this 31st day of January, 1913.

B. C. HARRISON,
Notary Public.

My commission expires April 18th, 1916.

101 In the District Court of the United States for the Eastern District of Virginia.

THE DALTON ADDING MACHINE COMPANY, Complainant,
v.
THE STATE CORPORATION COMMISSION of the Commonwealth of Virginia, Robert R. Prentis, William F. Rhea and J. Richard Wingfield, members of said Commission, Defendants.

In Equity. No. 88.

STATE OF VIRGINIA,
County of Henrico, ss:

Harry C. Grubbs, being duly sworn, on oath deposes and says:

I am the Harry C. Grubbs who made an affidavit in this case on or about the 18th day of December, 1912.

As stated in my other affidavit, I began my work as a solicitor or salesman for Dalton adding machines in the State of Virginia on or about the first day of February, 1912, so that I have now been engaged in such work for one year last past. During this time I have become pretty familiar with the manner in which the Burroughs Adding Machine Company conducts its business in the State of Virginia, as I have many times in my solicitation of

orders or proposals for Dalton machines come into competition with the Burroughs machine and with the salesmen of the Burroughs company. My understanding, and I believe that my understanding is correct, is that the Burroughs company has a regular and established place of business at Lynchburg, Virginia, as I recollect the place, in charge of a salaried department head or other responsible employee, where a depot or supply of machines is constantly kept on hand, so as to constitute a distributing point; and the agents or salesmen of the Burroughs company make sales of the Burroughs machines directly and outright, and receive the money for them, and pass the title to them, without the necessity of referring or transmitting the offers or proposals to buy to the home office of the company at Detroit, Michigan, for approval, acceptance or rejection, so that whenever a sale of a Burroughs machine is secured, the negotiations and transactions are not only conducted in the State of Virginia, but are completed and
102 consummated in such State, without the participation of the Burroughs company in Michigan. This, as has been fully pointed out in my other affidavit, is not the way that I effect sales of the complainant's machines, as I have no authority whatever to complete a transaction, or receive the money for a machine, or to do more than solicit a proposal or order, which I then in every case refer and transmit to the home office in Missouri, for approval, acceptance or rejection.

In reference to the contracts that the Southern Bell Telephone & Telegraph Company of Virginia, referred to by Mr. Wilson in his affidavit, the one for telephone service at my office, No. 22 North Seventh Street, Richmond, and the other for the insertion in its directory of the name of the complainant, and which contracts appear to be signed "Dalton Adding Machine Co., H. C. Grubbs, Va. Sales Mgr.," I have to say that such contracts were made and signed by me on my own responsibility and without referring the matter to the complainant, and without consultation with or authority from the complainant. In fact, the complainant was never informed one way or the other about the matter. I desired the name of the company to appear in the telephone directory, to facilitate the convenience of persons who might desire to communicate with me over the telephone, and who would naturally and more readily remember the name of the company whose machines I was selling than my own. As stated in my other affidavit, the telephone rental or charges have always been paid by me out of my own personal funds and in no part by the complainant. But as already said, I had no authority from the complainant to sign its name to these telephone contracts in the way that I did, and did so of my own initiative or motion.

In reference to the business card that Mr. Wilson says I handed him when I called at his office, as detailed in my other affidavit, I have to say that such card was my own personal business calling card and did not contain the name of the company, but simply the name of the Dalton machines for which I was soliciting purchasers. Such cards did not say that I was "Manager" for the complainant,

but simply that I was "Virginia Sales Manager," that is, manager for Virginia sales, which I considered as true, inasmuch as I was the head solicitor, and any assistants that I employed were under my control or management. In short, I was managing the business of soliciting sales for the complainant's machines in the State of Virginia, and I saw nothing improper in using a personal business calling card which informed the public that the matter
103 was under my charge, control or management.

In reference to the statement in Mr. Wilson's affidavit that ribbons, paper and miscellaneous supplies, necessary and convenient in the operation of the Dalton machines, are supplied from my office, I desire to say that these matters are a mere incident to the complainant's business and are trifling and insignificant in amount as compared to the sale of machines. To show this, I will state that while I have solicited sales of machines amounting to over fifteen hundred dollars ($1,500.00) per month, or an aggregate of eighteen thousand one hundred and fifty dollars ($18,150.00) during the year that I have been at work on the matter, the sale of paper, ribbons and other supplies have amounted to barely eight dollars ($8.00) per month, or scarcely more than one-half of one per cent of the business done. I kept a few ribbons and a few rolls of paper in my office, so that when purchasers and users of machines required the same they could be immediately supplied, without waiting for their shipment from Missouri. But notwithstanding this, the sales of such supplies were reported to the home office in Poplar Bluff, and the bills for the same were sent to the purchasers from the home office. No bills were issued from my office. Not only were these supplies furnished as above for the convenience of users of the machines, but they were furnished to them at about, if not quite, cost. They did not constitute the main or practically any of the reasons, ends, objects or purposes of the complainant's employment of me as a solicitor, or any incentive to me in my activity and work.

HARRY C. GRUBBS.

Subscribed and sworn to before me this 31st day of January, 1913.

CHARLES E. GARRETT,
Notary Public.

My commission expires April 27, 1915.

104 COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Case No. 471.

CITY OF RICHMOND, July 21, 1915.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
vs
THE DALTON ADDING MACHINE COMPANY.

Rule.

Rule under Section 1105, Code of Virginia.

The Commission having maturely considered the evidence and the argument of counsel, and being of the opinion for the reasons stated in writing and filed as a part of the record, that the defendant company has violated section 1104 of the Code of Virginia, as amended, by transacting business in this State without first obtaining the certificate of authority therefor required by law; therefore, it is considered by the Commission that The Dalton Adding Machine Company render unto the Commonwealth of Virginia a fine of one thousand dollars ($1,000.00) and the costs incident to this proceeding, and unless the same shall be paid to the clerk of the Commission within sixty days from this date that execution of fieri facias issue therefor, according to law.

COMMONWEALTH OF VIRGINIA:

Department of the State Corporation Commission.

Case No. 471.

COMMONWEALTH OF VIRGINIA at the Relation of the State Corporation Commission
vs.
THE DALTON ADDING MACHINE COMPANY.

105 *Rule.*

Rule under Section 1105, Code of Virginia.

John Garland Pollard, Attorney-General, Christopher B. Garnett, Assistant Attorney-General, for the Commonwealth.

Thomas A. Banning, Harold S. Bloomberg, for the defendant.

Prentis, Chairman, delivered the opinion of the Commission.

This proceeding is the sequel of the case of Dalton Adding Ma-

chine Company vs. State Corporation Commission of Virginia, 213 Fed. 889, which was affirmed 236 U. S. 699, 59 L. Ed. —.

The Dalton Adding Machine Company, now an Ohio corporation, is charged with violating section 1104 of the Code of Virginia, requiring foreign corporations as a prerequisite to doing business in the State to

"present to the State Corporation Commission (*a*) a written power of attorney executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (*b*) two duly authenticated copies of the charter of the corporation; and (*c*) a certificate of the Auditor of Public Accounts, showing the payments into the treasury of the fee required by law to be paid by such corporation, and shall obtain from the said Corporation Commission a certificate of authority to transact business in the State."

Section 1105 provides that any foreign corporation which shall transact business in this State without first obtaining such certificate of authority shall be fined "not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commission, whose duty it shall be to see that the provisions of the preceding section are complied with."

The facts are that the Dalton Adding Machine Company is a manufacturer of, and dealer in, adding, listing and calculating machines, which it formerly manufactured at Poplar Bluff, Missouri, but since June, 1914, at Cincinnati, Ohio, and distributes
106 through its salesmen to its customers wherever they can be found. Its authorized capital is $2,750,000, and its business in Virginia since 1912 has amounted to more than $18,000 a year. About two-thirds of its gross sales in Virginia are consummated as follows:

The agent exhibits a sample machine to the customer, and if the customer desires to buy he signs an order for a machine, describing its accessories accurately, addressed to the Dalton Adding Machine Company at its home office; if satisfactory to the customer, a machine is shipped from the factory either to the customer or to the agent in Virginia, to be delivered to the customer.

As to this part of the business there is no difference of opinion. It is strictly interstate commerce, protected by the commerce clause of the Constitution, and the State can impose no condition, license tax, or any other burden whatever, upon such business.

The other one-third of the business, however, is the cause of this controversy, and is thus transacted:

The machine is left with the desired customer for trial for a reasonable time, and afterwards, if he concludes to buy, he signs an order for that identical machine, which has been previously put in his possession, which order is sent to the Dalton Adding Machine Company at its home office, now in Ohio, and the same is then said to be consummated with the approval of the company.

It is contended by the Commonwealth that this business is in-

trastate business, and constitutes transacting business in the State of Virginia, in violation of the statute referred to.

In addition to this, the sales agent of the Dalton Adding Machine Company keeps on hand in his office in the City of Richmond a stock of paper and ribbons, suitable for use upon the machines, and from time to time supplies the customers of the company with ribbons and paper from this stock so held in the City of Richmond. Such sales are reported to the home office in Ohio, but require no previous or subsequent approval, the agent in Virginia having authority to consummate such sales.

In addition to this, the company has been entering into contracts to keep in repair for two years all of the machines sold to its Virginia customers. This time has now been shortened, and the company when making sales only agrees to keep the machine in repair for one year from the date of sale.

107 In addition to this, after the expiration of the time during which the company is thus under contract to keep the machines in repair, the company enters into what is called a repair contract, for ten dollars a year, undertaking to keep such machines in good repair. The agent of the company also keeps in stock at his office in Richmond certain parts, which are supplied to the users of the machines and charged for by the company. In order to make these repairs the company regularly employes a mechanic in this State, whose duty it is as the representative of the company to comply with these repair contracts. This mechanic also makes additional repairs in Virginia upon the demand of the customers who have no such repair contracts—the time of the mechanic being reported to the home office—and bills are made out in the name of the company for such repairs and collected of the Virginia customer.

In addition to this, the company rents its machines to persons in Virginia, delivers the machines to the renter and collects rent for the use thereof, which rents, in case the renter subsequently decides to buy that particular machine, are credited on the purchase price, the company reserving the right to resume possession of the machine in case of violation of the rental contract, or upon its expiration.

It also, in making sales, sometimes receives machines made by other manufacturers in exchange for its machines, which machines so received in exchange it disposes of as best it can.

It is earnestly contended for the defendant company that because the salesman in Virginia is denied express authority to transfer title to the machines which are sold, and that in every instance the contracts provide that the order is subject to the approval of the Dalton Adding Machine Company at its home office, now in Ohio, and the transaction is between citizens of different States, that therefore the business is interstate commerce.

A number of quotations from decisions are made to the effect that interstate commerce consists of transactions between "citizens of different States," and great emphasis is laid upon this precise language. We think, however, that the decisions do not justify this emphasis, and that no case can be found in which the character of the commerce is made to depend upon the citizenship of the parties

or the place of final ratification of the contract. The true test is, not the citizenship of the parties, but the essential character of the transaction. In this case counsel seem to be conscious of this
108 doctrine, and so has introduced a new term, and calls the transaction an "interstate contract," apparently concluding that if the contract be "interstate" the commerce is interstate. In this connection he says: "This distinguishes this case from all the other cases that we have been able to find in the Supreme and Circuit Courts, and serves, as we think, to stamp the transactions of the defendant with the characteristics and indicia of interstate business, protected by the commerce clause of the Constitution."

This is the gist of the contention here, and the defendant's case depends upon the ability to establish this proposition.

If it be true that because, at some stage of a commercial transaction, it is necessary to have the approval of the seller, who is a citizen of a different State and located in that other State at the time the contract is said to be completed, therefore the transaction is interstate commerce, then a discovery has been made and a new and large class of commercial transactions which are in essential character intrastate commerce will be protected by the commerce clause of the Constitution. The seller of goods by retail may establish his phase of business in one State and his residence in another, and by requiring that all transactions shall be subject to his approval in the State of his residence may escape all local license and privilege taxes.

An ineffectual effort to escape State local taxes by requiring the contract to be approved at the home office seems to have been made by the Singer Sewing Machine Company in Alabama. Singer Sewing Machine Co. vs. Brickell, 233 U. S. 304, 58 L. Ed. 974. That case differs from this in some vital particulars, but in that particular it is identical.

It was said in Western Union Telegraph Co. vs. Kansas, 216 U. S 26, that:

"We are aware of no decision of this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another State."

We may add to this that we are aware of no decision by the Supreme Court of the United States holding that anybody may, by any device or by any ways or means whatsoever, avoid local license taxes for doing intrastate business contrary to the laws of a State. That this method of transacting business by the Dalton Adding Machine Company is a mere device for the purpose of avoiding
109 the State statutes is apparent, when the contention is made that, even in case of a cash transaction, when a machine, previously in the possession of the purchaser, is sold by a local agent to that purchaser for cash, strictly in accordance with the previous instructions given to the local agent, such a transaction needs confirmation by the company at its home office. The price is fixed, the property delivered, the terms complied with, and nothing is left of such a transaction except for the local agent to send the check or

the currency to the selling company. Inasmuch as the purchaser has complied with every substantial term of the contract, it is not believed that the selling company could refuse to accept the purchase price, notwithstanding the device referred to. It can only be resorted to in case of such a cash transaction for the purpose of attempting to convert "into a form resembling interstate commerce that which in its intrinsic substance is local business subject to State control." A similar effort has been vainly essayed and condemned by the Supreme Court of the United States. Waycross v. Georgia, 233 U. S. 16, 58 L. Ed. 828.

That the citizenship of the parties does not determine the question may be illustrated in this way:

The seller, a wholesale manufacturer or merchant, may live in the same house with a buyer, a retail merchant doing business on the same street on which their joint residence is located, and the wholesale merchant or manufacturer may, in the State of their joint residence, sell the retailer some of his merchandise then located in an adjoining State, and may be in the habit of having such transactions with the retailer, yet no one can doubt that such business is clearly interstate commerce, protected by the commerce clause of the Constitution, although both of the contracting parties live in the same house, and the entire business transacted in that house.

While it is true that transactions between citizens of different States are generally transactions of interstate commerce, still this is merely the usual incident, and it must be conceded that it is the character of the transaction, and not the citizenship of the location of the parties, that determines whether it is interstate or intrastate commerce.

The courts will therefore endeavor to ascertain the real character of the transaction.

That contracts for such sales as we are now considering are Virginia contracts is plainly demonstrated by the fact that the
110 contract is negotiated between an agent of the seller in Virginia and a purchaser in Virginia, for the sale of a machine which is in Virginia, the terms of sale being completed and the contract fully performed in this State.

London Assurance v. Campania De Moagens do Marreiro, 167 U. S. 160, 42 L. Ed. 120.

Here the movement of the machines in interstate commerce has been accomplished. They are at rest in this State, some of them in the possession of the local agent, some in the possession of persons with whom they have been left for trial, and some are held by persons in this State as lessees. They are mingled with the other property of the State and protected by State law. It seems to be admitted that they are subject to the local property tax.

The sales of such machines thus in the State, mingled with the other property in the State and subject to local taxation, cannot be distinguished from the sales of any other property thus located in the State. If the mere intention of the seller, a citizen of another State, to sell such machines before having shipped them into this State and his necessary confirmation of such sales stamps such trans-

actions interstate commerce, then the shield which the Constitution intended for commerce *between* the States will, by a strained and unnatural construction, become a sword for the destruction of commerce *in* the States. Commercial transactions in this State involving the bargain and sale of specific commodities sold in competition with local dealers may escape all State exactions by the mere device of having the non-resident owner ship them into this State and say that (even when they are sold for cash) all sales are subject to his approval outside of the State. It seems to us that the mere statement of the results which would follow if this admittedly new doctrine is established would be so revolutionary as to condemn it as unsound.

We regard the case of Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, and Armour Packing Company v. Lacy, 200 U. S. 226, 50 L. Ed. 451, both of which were cases of foreign meat packing houses doing a large interstate business and a small intrastate business by selling a part of their product after the same had been shipped into the States imposing the tax, and the cases cited in the opinions, as decisive of the question here referred to. In these cases the foreign corporations were required to comply with the State laws, because part of the business was intrastate. The case of Swift & Co. v.
111 United States, 196 U. S. 398, seems to be relied upon by the defendant's counsel. We are unable to apply that decision in any way to the question here involved.

That was a prosecution by the United States against the beef trust, alleging a great combination and conspiracy in restraint of trade, in violation of the Act of July 2nd, 1890. (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, page 3200). "To Protect Trade and Commerce against Unlawful Restraints and Monopolies."

The defendants in that case were charged with engaging in the business of buying and slaughtering live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, St. Louis and St. Paul; of selling such fresh meats to dealers and consumers in divers states and territories of the United States other than those wherein the cattle were slaughtered, and in the District of Columbia, and distributing the same; that the defendants together controlled about six-tenths of the whole trade and commerce in fresh meats among the states and territories and the District of Columbia; and that but for the unlawful acts charged the defendants would be in free competition with each other; that in order to restrain competition among themselves they agreed to refrain from bidding against each other "except perfunctorily and without good faith," and by this means compelled owners of stock to sell at smaller prices than they would receive at the holding by real competitors; that they combined to bid up the price of live stock for a few days at a time, thereby inducing stock owners in other states to make large shipments to the stock yards to the owners' disadvantage; with attempting to monopolize commerce; to arbitrarily from time to time raise, lower and fix prices, and to maintain uniform prices at which they would sell to dealers throughout the United States; that this was effected by secret periodical meetings, at which prices were maintained directly,

and by collusively restricting the meat shipped by the defendants, whenever conducive to the result; and that they had endeavored to control transportation rates by arrangements with the railroads whereby the defendants received rebates, and had their product transported at less than the lawful rates, etc.

The defendants allege by way of defense that part of the transactions complained of were strictly intrastate commerce and hence beyond the control of the Congress. The court, however, overruled this defense upon the ground that acts lawful in themeslves were unlawful when combined with other acts as a part of
112 an unlawful scheme in restraint of trade, to prevent competition, and to create a monopoly in contravention of the act.

Mr. Justice Holmes, delivering the opinion of the court, appears to have anticipated that some of his remarks might be misconstrued just as the defendant's counsel has here, in our opinion, misconstrued them, and so takes care to say in this connection:

"But we do not mean to imply that the rule which marks the point at which State taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them."

From this it seems perfectly apparent that it was not intended by that decision to in any way modify or change any of the established doctrines as to the right of the states to impose reasonable conditions upon foreign corporations desiring to do intrastate business.

The suggestion that the intrastate business in this case is smaller than the interstate business, or insignificant and incidental, is not decisive. As is well said by the assistant attorney general in his brief:

"The test to determine whether a foreign corporation transacts such intrastate business as can be reached by state taxation is whether domestic business is substantial in its essence, and whether it may reasonably be separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce."

"The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation, and is in other respects invulnerable, the mere fact that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources is the thing which is made the subject of the exercise."

113 Marconi Wireless Telegraph Co. v. Commonwealth, 105 N. E. 314, 218 Mass. 566.

Baltic Mining Co. v. Mass., 231 U. S. 68, 58 L. Ed. 127.

We do not think it necessary to undertake to analyze the numerous authorities. The Supreme Court of the United States has dealt with the questions here involved in many cases. These cases are well summarized by Mr. Chief Justice Rugg in the case of Marconi Wireless Telegraph Co. v. Commonwealth, 105 N. E. 314, 218 Mass. 566. Other instructive cases are:

Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828;

American Steel & Wire Co. v. Speed, 192 U. S. 508, 48 L. Ed. 538.

We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding Machine Company is doing a substanital part of its business in this State in the following particulars:

(*a*) In bringing its machines into this State before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this State, after their trasportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this State;

(*b*) In renting such machines and collecting rents therefor from its customers in this State at will;

(*c*) In buying and exchanging its machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

(*d*) In employing a mechanic in this State and entering into contracts for repairing of machines owned by persons in this State from time to time and collecting the charges therefor;

(*e*) In keeping on hand in this State certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agent in Richmond to its customers.

114 We think it perfectly apparent that in these particulars the business of the company in this State is not "commerce among the States," the freedom of which is guaranteed by the United States Constitution, but that such business, in every essential particular, is business which has been transacted by the company in this State in violation of the statutes referred to.

We will therefore enter an order in the usual form, imposing a fine of one thousand dollars upon the defendant company, that being the amount of the fee which the said company would have been required to pay in case it had complied with the Virginia statutes.

Rhea, commissioner, concurs.

Wingfield, commissioner, not sitting.

The chairman of the State Corporation Commission hereby certifies to the Supreme Court of Appeals of Virginia that the foregoing contains and sets out all of the facts and evidence upon which the action of the Commission in said proceeding was based, and which are essential to a proper decision of the appeal to be taken from such action, and is also a true transcript of the proceedings and orders of the Commission of such proceeding.

Witness the seal of the State Corporation Commission and the signature of the chairman, attested by the clerk, this 10th day of September, 1915, and in the one hundred and fortieth year of the Commonwealth.

[SEAL.] ROBERT R. PRENTIS, *Chairman.*

Attest:

R. T. WILSON, *Clerk.*

A copy—Teste:

H. STEWART JONES, *C. C.*

115 *Opinion by Judge Jos. L. Kelly.*

THE DALTON ADDING MACHINE COMPANY
v.
COMMONWEALTH.

RICHMOND, VA., March 16, 1916.

State Corporation Commission.

KEITH, *P.*, absent.

KELLY, *J.*:

This is an appeal from an order of the State Corporation Commission, by which the Dalton Adding Machine Company, a foreign corporation, was assessed with a fine of one thousand dollars upon a charge of transacting business in this State without first obtaining the certificate of authority as provided for in section 1104 of the Code of Virginia.

It is not denied that this company is, and has been for several years, doing an extensive business in this State, but the contention on its behalf is that this business has been of such a character and so conducted in all respects as to bring it within the meaning and consequent protection of the commerce clause of the Federal Constitution.

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The first impression obtained from reading the record is that the company's purpose has been to avoid, not to say evade, the license tax provided for by section 1104 of the Code; and, upon a more mature consideration this impression becomes a conviction that the method of transacting a substantial part of the business in question is, as found by the Corporation Commission, "a mere device for the purpose of avoiding the State statutes."

A foreign corporation has the unquestionable right to so limit and conduct its business in this State as to keep the same strictly within the accepted meaning of interstate commerce, and, when it does so, no license tax can be imposed upon it. But it seems to us in this case that the effort to escape the tax has been such a conspicuous and dominant feature in the course of business, and so

plainly marked by irregular and unusual practices, explainable only on the theory that they were intended to place an artificial interstate aspect on a portion of the business, that the corporation has not only laid itself liable to a just suspicion, but has thereby created a presumption, not rebutted by any evidence, against the good faith of its claim to immunity.

The opinion of the chairman of the State Corporation Commission, which is a part of the record, appears to us to correctly and satisfactorily dispose of this controversy, and is hereby adopted as the opinion of this court. It is as follows:

"This proceeding is the sequel of the case of Dalton Adding Machine Company v. State Corporation Commission of Virginia, 213 Fed. 889, which was affirmed 236 U. S. 699, 59 L. Ed. 797.

"The Dalton Adding Machine Company, now an Ohio corporation, is charged with violating section 1104 of the Code of Virginia, requiring foreign corporations, as a prerequisite to doing
117 business in the State, to 'present to the State Corporation Commission (*a*) a written power of attorney executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (*b*) two duly authenticated copies of the charter of the corporation; and (*c*) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from the said Corporation Commission a certificate of authority to transact business in the State.'

"Section 1105 provides that any foreign corporation which shall transact business in this State without first obtaining such certificate of authority shall be fined 'not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commission, whose duty it shall be to see that the provisions of the preceding section are complied with.'

"The facts are that the Dalton Adding Machine Company is a manufacturer of, and dealer in, adding, listing and calculating machines, which it formerly manufactured at Poplar Bluff, Missouri, but since June, 1914, at Cincinnati, Ohio, and distributes through its salesmen to its customers wherever they can be found. Its authorized capital is $2,750,000, and its business in Virginia since 1912 has amounted to more than $18,000 a year.

"About two-thirds of its gross sales in Virginia are consummated as follows:

"The agent exhibits a sample machine to the customer, and if the customer desires to buy he signs an order for a machine, describing its accessories accurately, addressed to the Dalton Adding Machine Company at its home office; if satisfactory to the company, a machine is shipped from the factory either to the customer or to the agent in Virginia, to be delivered to the customer.

"As to this part of the business there is no difference of opinion.

It is strictly interstate commerce, protected by the commerce
118 clause of the Constitution, and the State can impose no condition, license tax, or any other burden whatever, upon such business.

"The other one-third of the business, however, is the cause of this controversy, and is thus transacted:

"The machine is left with the desired customer for trial for a reasonable time, and afterwards, if he concludes to buy, he signs an order for that identical machine, which had been previously put in his possession, which order is sent to the Dalton Adding Machine Company at its home office, now in Ohio, and the sale is then said to be consummated with the approval of the company.

"It is contended by the Commonwealth that this business is intrastate business, and constitutes transacting business in the State of Virginia, in violation of the statute referred to.

"In addition to this, the sales agent of the Dalton Adding Machine Company keeps on hand in his office in the city of Richmond a stock of paper and ribbons, suitable for use upon the machines, and from time to time supplies the customers of the company with ribbons and paper from this stock so held in the city of Richmond. Such sales are reported to the home office in Ohio, but require no previous or subsequent approval, the agent in Virginia having authority to consummate such sales.

"In addition to this, the company has been entering into contracts to keep in repair for two years all of the machines sold to its Virginia customers. This time has now been shortened, and the company when making sales only agrees to keep the machines in repair for one year from the date of sale.

"In addition to this, after the expiration of the time during which the company is thus under contract to keep the machines in repair, the company enters into what is called a repair contract, and, for ten dollars a year, undertakes to keep such machines in good repair.

The agent of the company also keeps in stock at his office in
119 Richmond certain parts, which are supplied to the users of the machines and charged for by the company. In order to make these repairs the company regularly employs a mechanic in this State, whose duty it is as the representative of the company to comply with these repair contracts. This mechanic also makes additional repairs in Virginia upon the demand of the customers who have no such repair contracts—the time of the mechanic being reported to the home office—and bills are made out in the name of the company for such repairs and collected of the Virginia customer.

"In addition to this, the company rents its machines to persons in Virginia, delivers the machines to the renter and collects rent for the use thereof, which rents, in case the renter subsequently decides to buy that particular machine, are credited on the purchase price, the company reserving the right to resume possession of the machine in case of violation of the rental contract, or upon its expiration.

"It also, in making sales, sometimes receives machines made by other manufacturers in exchange for its machines, which machines so received in exchange it disposes of as best it can.

"It is earnestly contended for the defendant company that because the salesman in Virginia is denied express authority to transfer title to the machines which are sold, and that in every instance the contracts provide that the order is subject to the approval of the Dalton Adding Machine Company at its home office, now in Ohio, and the transaction is between citizens of different states, that therefore the business is interstate commerce.

"A number of quotations from decisions are made to the effect that interstate commerce consists of transactions between 'citizens of different states,' and great emphasis is laid upon this precise language. We think, however, that the decisions do not justify this emphasis, and that no case can be found in which the char-
120 acter of the commerce is made to depend upon the citizenship of the parties or the place of final ratification of the contract. The true test is not the citizenship of the parties, but the essential character of the transaction. In this case counsel seems to be conscious of this doctrine, and so has introduced a new term, and calls the transaction an 'interstate contract,' apparently concluding that if the contract be 'interstate' the commerce is interstate. In this connection he says: 'This distinguishes this case from all the other cases that we have been able to find in the supreme and circuit courts, and serves, as we think, to stamp the transactions of the defendant with the characteristics and indicia of interstate business, protected by the commerce clause of the Constitution.'

"This is the gist of the contention here, and the defendant's case depends upon the ability to establish this proposition.

"If it be true that because, at some stage of a commercial transaction, it is necessary to have the approval of the seller, who is a citizen of a different State and located in that other State at the time the contract is said to be completed, therefore the transaction is interstate commerce, then a discovery has been made and a new and large class of commercial transactions which are in essential character intrastate commerce will be protected by the commerce clause of the Constitution. The seller of goods by retail may establish his place of business in one State and his residence in another, and by requiring that all transactions shall be subject to his approval in the State of his residence may escape all local license and privilege taxes.

"An ineffectual effort to escape State local taxes by requiring the contract to be approved at the home office seems to have been made by the Singer Sewing Machine Company in Alabama. Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed. 974.
121 That case differs from this in some vital particulars, but in that particular it is identical.

"It was said in Western Union Telegraph Co. v. Kansas, 216 U. S. 26: 'We are aware of no decision of this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee' or otherwise, burden the interstate business of a corporation of another State.' We may add to this that we are aware of no decision by the Supreme Court of the United States holding that anybody may, by any device or by any way or means

whatsoever, avoid local license taxes for doing intrastate business contrary to the laws of a State. That this method of transacting business by the Dalton Adding Machine Company is a mere device for the purpose of avoiding the State statutes is apparent when the contention is made that, even in case of a cash transaction, when a machine, previously in the possession of the purchaser, is sold by a local agent to that purchaser for cash, strictly in ac-ordance with the previous instructions given to the local agent, such a transaction needs confirmation by the company at its home office. The price is fixed, the property delivered, the terms complied with, and nothing is left of such a transaction except for the local agent to send the check or the currency to the selling company. Inasmuch as the purchaser has complied with every substantial term of the contract, it is not believed that the selling company could refuse to accept the purchase price, notwithstanding the device referred to. It can only be resorted to in case of such a cash transaction for the purpose of attempting to convert 'into a form re-embling interstate commerce that which in its intrinsic substance is local business subject to State control.' A similar effort has been vainly essayed and condemned by the Supreme Court of the United States. Wayeross v. Georgia, 233 U. S. 16, 58 L. Ed. 828.

"That the citizenship of the parties does not determine the question may be illustrated in this way:

122 "The seller, a wholesale manufacturer or merchant, may live in the same house with a buyer, a retail merchant doing business on the same street on which their joint residence is located, and the wholesale merchant or manufacturer may, in the State of their joint residence, sell the retailer some of his merchandise then located in an adjoining State, and may be in the habit of having such transactions with the retailer, yet no one can doubt that such business is clearly interstate commerce protected by the commerce clause of the Constitution, although both of the contracting parties live in the same house, and the entire business is transacted in that house.

"While it is true that transactions between citizens of different States are generally transactions of interstate commerce, still this is merely the usual incident, and it must be conceded that it is the character of the transaction, and not the citizenship or the location of the parties, that determines whether it is interstate or intrastate commerce.

"The courts will, therefore, endeavor to ascertain the real character of the transaction.

"That contracts for such sales as we are now considering are Virginia contracts is plainly demonstrated by the fact that the contract is negotiated between an agent of the seller in Virginia and a purchaser in Virgina, for the sale of a machine which is in Virginia, the terms of sale being completed and the contract fully performed in this State. London Assurance v. Campania De Moagens do Marreiro, 167 U. S. 160, 42 L. Ed. 120.

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the possession of the local agent, some in the possession of persons with whom they have been left for trial, and some are held by persons in this State as lessees. They are mingled with the other property of the State and protected by State law. It seems to be admitted that they are subject to the local property tax.

123 "The sales of such machines thus in the State, mingled with the other property in the State and subject to local taxation, cannot be distinguished from the sales of any other property thus located in the State. If the mere intention of the seller, a citizen of another State, to sell such machines before having shipped them into this State and his necessary confirmation of such sales stamps such transactions interstate commerce, then the shield which the Constitution intended for commerce between the States will, by a strained and unnatural construction, become a sword for the destruction of commerce in the States. Commercial transactions in this State involving the bargain and sale of specific commodities sold in competition with local dealers may escape all State exactions by the mere device of having the non-resident owner ship them into this State and say that (even when they are sold for cash) all sales are subject to his approval outside of the State. It seems to us that the mere statement of the results which would follow if this admittedly new doctrine is established would be so revolutionary as to condemn it as unsound.

"We regard the case of Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, and Armour Packing Company v. Lacy, 200 U. S. 226, 50 L. Ed. 451, both of which were cases of foreign meat packing houses doing a large interstate business and a small intrastate business by selling a part of their product after the same had been shipped into the States imposing the tax, and the cases cited in the opinions, as decisive of the question here referred to. In these cases the foreign corporations were required to comply with the State laws, because part of the business was intrastate. The case of Swift & Co. v. United States, 196 U. S. 398, seems to be relied upon by the defendant's counsel. We are unable to apply that decision in any way to the question here involved.

"That was a prosecution by the United States against the beef trust, alleging a great combination and conspiracy in restraint of

124 trade, in violation of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, page 3200), 'To Protect Trade and Commerce against Unlawful Restraints and Monopolies.'

"The defendants in that case were charged with engaging in the business of buying and slaughtering live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, St. Louis and St. Paul; of selling such fresh meats to dealers and consumers in divers States and territories of the United States other than those wherein the cattle were slaughtered, and in the District of Columbia, and distributing the same; that the defendants together controlled about six-tenths of the whole trade and commerce in fresh meats among the States and territories and the District of Columbia; and that but for the unlawful acts charged the defendants would be in free competition

with each other; that in order to restrain competition among themselves they agreed to refrain from bidding against each other 'except perfunctorily and without good faith,' and by this means compelled owners of stock to sell at smaller prices than they would receive at the bidding by real competitors; that they combined to bid up the price of live stock for a few days at a time, thereby inducing stock owners in other States to make large shipments to the stock yards to the owners' disadvantage; with attempting to monopolize commerce; to arbitrarily from time to time raise, lower and fix prices, and to maintain uniform prices at which they would sell to dealers throughout the United States; that this was effected by secret periodical meetings, at which prices were maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result; and that they had endeavored to control transportation rates by arrangements with the railroads whereby the defendants received rebates, and had their product transported at less than the lawful rates, etc.

"The defendants alleged by way of defense that part of the transactions complained of were strictly intrastate commerce, and
125 hence beyond the control of the Congress. The court, however, overruled this defense upon the ground that acts lawful in themselves were unlawful when combined with other acts as part of an unlawful scheme in restraint of trade, to prevent competition, and to create a monopoly in contravention of the act.

"Mr. Justice Holmes, delivering the opinion of the court, appears to have anticipated that some of his remarks might be misconstrued just as the defendant's counsel has here, in our opinion, misconstrued them, and so takes care to say in this connection: 'But we do not mean to imply that the rule which marks the point at which State taxation or regulation become permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them.'

"From this it seems perfectly apparent that it was not intended by that decision to in any way modify or change any of the established doctrines as to the right of the States to impose reasonable conditions upon foreign corporations desiring to do intrastate business.

"The suggestion that the intrastate business in this case is smaller than the interstate business, or insignificant and incidental, is not decisive. As is well said by the assistant attorney-general in his brief: 'The test to determine whether a foreign corporation transacts such intrastate business as can be reached by State taxation, is whether domestic business is substantial in its essence, and whether it may reasonably be separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce.'

" 'The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general

in its operation, and is in other respects invulnerable, the
126 mere fact that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources is the thing which is made the subject of the excise.'

"Marconi Wireless Telegraph Co. v. Commonwealth, 105 N. E. 314, 218 Mass. 566; Baltic Mining Co. v. Mass., 231 U. S. 68, 58 L. Ed. 127.

"We do not think it necessary to undertake to analyze the numerous authorities. The Supreme Court of the United States has dealt with the questions here involved in many cases. These cases are well summarized by Mr. Chief Justice Rugg in the case of Marconi Wireless Telegraph Co. v. Commonwealth, supra. Other instructive cases are: Browning v. Waycross, 233 U. S. 16, 58 L. Ed. 828; American Steel & Wire Co. v. Speed, 192 U. S. 508, 48 L. Ed. 538.

"We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding Machine Company is doing a substantial part of its business in this State in the following particulars:

"(*a*) In bringing its machines into this State before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this State, after their transportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this State;

"(*b*) In renting such machines and collecting rents therefor from its customers in this State at will;

"(*c*) In buying and exchanging machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

"(*d*) In employing a mechanic in this State and entering into contracts for repairing of machines owned by persons in this State from time to time and collecting the charges therefor;

127 "(*e*) In keeping on hand in this State certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agent in Richmond to its customers.

"We think it perfectly apparent that in these particulars the business of the company in this State is not 'commerce among the States,' the freedom of which is guaranteed by the United States Constitution, but that such business, in every essential particular, is business which has been transacted by the company in this State in violation of the statutes referred to."

See, also, the case of General Railway Signal Co. v. Commonwealth, 87 S. E. 598, 11 Va. App. 400, 118 Va. —, and authorities therein cited.

The order appealed from is affirmed.

Affirmed.

128 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building in the City of Richmond on Thursday, the 16th Day of March, 1916.

DALTON ADDING MACHINE COMPANY, Appellant,
against
THE COMMONWEALTH OF VIRGINIA, Appellee.

Upon an Appeal from and Supersedeas to an Order Entered by the State Corporation Commission on the 21st Day of July, 1915.

This day came again as well the appellant, by counsel, as the Attorney General on behalf of the Commonwealth, and the Court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order appealed from. It is therefore adjudged, ordered and decreed that the same be affirmed, and that the appellant pay to the Commonwealth damages according to law and also her costs by her expended about her defence herein.

Which is ordered to be forthwith certified to the State Corporation Commission.

A copy.

Teste:

H. STEWART JONES, *C. C.*

129 *Petition for Writ of Error.*

Supreme Court of Appeals of Virginia.

COMMONWEALTH OF VIRGINIA at the Relation of the STATE CORPORATION COMMISSION, Plaintiff,
vs.
THE DALTON ADDING MACHINE COMPANY, a Corporation, Defendant.

Considering itself aggrieved by the final decision of the Supreme Court of Appeals of Virginia, rendered against it in the above entitled case, the defendant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of Errors.

And the said The Dalton Adding Machine Company assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Appeals of Virginia erred in holding that the defendant is not engaged in interstate commerce and is therefore subject to a fine for transacting business in the state of Virginia

without first obtaining a certificate of authority from the State Corporation Commission and paying the fee required by statute.

The said errors are more particularly set forth as follows:

130 The Supreme Court of Appeals of Virginia erred in holding and deciding that the defendant is not engaged in interstate commerce:

(1) When a machine manufactured by said defendant in Ohio is shipped to Virginia for the purpose of sale and is left on trial with a prospective customer, who subsequently signs an order for the purchase of the identical machine in his possession, and this order is sent for approval to defendant at its home office in Ohio, in accordance with the provisions of said order requiring its approval at the executive office of the company in Ohio before it becomes a contract between the parties;

(2) When the defendant rents to a person in Virginia a machine shipped into the state from Ohio, and collects rent for the use thereof, which rent, in case the renter subsequently decides to buy that particular machine, is credited on the purchase price, and the contract of rental, in accordance with its provisions, is not effective until approved and accepted by the defendant at its office in Ohio;

(3) When the defendant, in making a sale, receives a machine made by another manufacturer in exchange for its machine, and disposes of said machine so received, under a written contract requiring the approval of the defendant at its office in Ohio before such contract becomes effective;

(4) When the defendant, in fulfillment of its guarantee to purchasers to keep a machine in repair for a definite period, as one year, pays a mechanic in Virginia for looking after the machines, as they get out of order or require repairs, or enters into contracts with purchasers of machines to keep them in order for a stipulated sum per year, and collects charges therefor, billing the invoices for such charges from its home office in Ohio;

131 (5) When the defendant keeps on hand in Virginia with its salesman or solicitor certain small parts of machines, ribbons and rolls of paper suitable for use upon said machines which are sold from time to time to the users of its machines in said state, billing the invoices for such sales from its home office in Ohio.

For which errors the defendant, The Dalton Adding Machine Company, prays that the said judgment of the Supreme Court of Appeals of Virginia, dated March 16, 1916, be reversed and a judgment rendered in favor of the defendant company and for costs.

THOMAS A. BANNING,
HAROLD S. BLOOMBERG,
Attorneys for The Dalton Adding Machine Company, Defendant.

STATE OF VIRGINIA,
Supreme Court of Appeals of Virginia, To wit:

Let the writ of error issue upon the execution of a bond by The Dalton Adding Machine Company to the Commonwealth of Vir-

ginia, in the sum of $1,500.00; such bond, when approved, to act as a supersedeas.

Dated April 15, 1916.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

132 [Endorsed:] Supreme Court of Appeals of Virginia. Commonwealth of Virginia, at the relation of the State Corporation Commission, vs. The Dalton Adding Machine Company. Petition for Writ of Error, etc.

133 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Commonwealth of Virginia, at the relation of the State Corporation Commission, and The Dalton Adding Machine Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Dalton Adding Machine Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the third day of May, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk District Court of the United States for the Eastern District of Virginia.

Allowed, May 4, 1916.
JAMES KEITH,
President Supreme Court of Appeals of Virginia.

[Endorsed:] Received & filed May 4, 1916. H. Stewart Jones, Clerk.

134 (*Copy.*)

THE DALTON ADDING MACHINE COMPANY, a Corporation, Plaintiff in Error,
vs.
COMMONWEALTH OF VIRGINIA at the Relation of the STATE CORPORATION COMMISSION, Defendant in Error.

Know all men by these presents, that we, The Dalton Adding Machinge Company, as principal, and National Surety Company, as surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of Fifteen Hundred Dollars ($1,500.00), to be paid to the said Commonwealth of Virginia, to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 22nd day of April, 1916.

Whereas the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of Appeals of Virginia;

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all fines, costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation shall be void; otherwise it shall remain in full force and effect.

THE DALTON ADDING MACHINE COMPANY, [SEAL.]
By HAROLD S. BLOOMBERG,
Attorney-in-Fact.

[Seal National Surety Company, New York. Incorporated 1897.]

NATIONAL SURETY COMPANY,
By ARTHUR M. CANNON,
Attorney-in-Fact.

Bond Approved:
JAMES KEITH,
President Supreme Court of Appeals of Virginia.

[Endorsed:] Received & filed April 29, 1916. H. Stewart Jones, Clerk.

135 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of the State of Virginia, wherein The Dalton Adding Machine Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 4th day of May, 1916.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

JAMES KEITH,
President Supreme Court of Appeals of the State of Virginia.

Attest:
H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia.

Legal service of the above citation is hereby acknowledged.
JNO. GARLAND POLLARD,
Attorney General of Virginia.

May 8, 1916.

[Endorsed:] Office of the Clerk Supreme Court U. S. Received May 23 1916.

136 *Authentication of Record.*

SUPREME COURT OF APPEALS, STATE OF VIRGINIA, *ss:*

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to —, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of The Dalton Adding Machine Company, Appellant vs. Commonwealth of Virginia, Appellee, and also of the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said Court at my office, in Richmond, Virginia, this 22nd day of May, 1916.

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Va.

I, James Keith, one of the Judges and the President of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the — day of ——, 1916.

JAMES KEITH, [SEAL.]
President Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of the said Court this the 22nd day of May, 1916.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia.

Endorsed on cover: File No. 25,320. Virginia Supreme Court of Appeals. Term No. 498. The Dalton Adding Machine Company, plaintiff in error, vs. The Commonwealth of Virginia at the relation of The State Corporation Commission. Filed May 29th, 1916. File No. 25,320.

INDEX.

Cases Cited in Argument.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1916.

No. 498.

THE DALTON ADDING MACHINE COMPANY,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF VIRGINIA AT THE RELATION OF THE STATE CORPORATION COMMISSION.
Defendant in Error.

BRIEF AND ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

May it please the Court:

As appears from the sworn answer and proofs in this case, the plaintiff in error, hereinafter called the defendant, is a foreign corporation, formerly of Missouri, but now of Ohio, engaged in the manufacture and sale of adding, listing and calculating machines. The answer and proofs show that it appointed a party in Virginia, one Harry C. Grubbs, to solicit orders or proposals to buy its adding machines (or to rent as an inducement to lead to a purchase), and that all of such orders or proposals are in writing, and are transmitted

through the mails to the home office of the defendant in the state of its residence, formerly Missouri, but now of Ohio, for consideration, acceptance or rejection. It has shown that the salesman or solicitor has no power to sell or to rent a machine in any way, in Virginia, or to transfer title to a machine in any way, and that in no instance has he done so, or had authority from the defendant so to do. As a matter of fact, all of the sales or rentals by the defendant of its machines in the State of Virginia have been effected through written proposals or orders in the way above stated, so that there has actually been no sale or rental of a machine where the act of sale or rental took place or was consummated *in* the State of Virginia by any one *in* the State of Virginia. The sales or rentals are always effected by transactions which *include* the defendant, as one principal, located in another state, and the purchaser, as the other principal, located in Virginia. The contracts all have involved *dealings* between the respective principals located in *different* states, so that the contract of sale or rental has been, in the strictest sense of the term, an *inter*-state contract, and not a local contract. This method of doing business distinguishes this case from all the other cases that we have been able to find in the Supreme or Circuit Courts, and serves, as we think, to stamp the transactions of the defendant with the characteristics and indicia of inter-state business protected by the commerce clause of the Constitution.

Nor has the above method of doing business been departed from in those cases where the machines have been shipped into the State of Virginia *before* a sale or rental of them has been effected. They were shipped, as explained in the answer and shown in the proofs, for the *purpose* of sale, as the sole aim and object of the shipment, and the respective purchaser or renter allowed to try or test them to determine their utility

and applicability to his business. But when he decided to make a purchase or rental, even though he desired to retain the machine already in his hands, which he had tested, and with the mechanism and operation of which he had familiarized himself, he has not been able to buy or rent the same *from* the salesman or solicitor *in* Virginia, but has been required to sign an order or proposal, which was then mailed to the defendant at its Home Office, for consideration, acceptance or rejection. Thus in all of the purchases or rentals of machines already in the State of Virginia, there was necessarily involved a *dealing or transaction* between the purchaser or renter on the one hand and the defendant on the other, both dealing as *principals* from their respective states. Consequently, there has existed in all of such purchases or rentals of machines an *inter*-state dealing or contract such as existed in none of the other cases reported in the books, where the defendant was held amenable to the state statutes. This fact or circumstance stamps such purchases or dealings with an inter-state character, protected by the commerce clause of the Constitution, as we earnestly submit and insist.

The forms of the contracts, where the purchase was made for cash outright, or on time payments, or where the machines were rented, are set out in the fifth paragraph of the answer (Rec. 8) and established in the proofs, and in all of them it appears that the contract was not effective and did not become a *contract* between the parties until, and until *after*, it was signed by the purchaser or renter in Virginia, as a proposal, and had been sent to the home office of the company in another state, *where* it was accepted or rejected according to circumstances so that the contract of purchase or rental became an *inter*-state contract.

The sworn answer fully sets out all of the facts disclosing the defendant's method of doing business, and they are sup-

ported and corroborated by the proofs, and we trust that this court will read the answer for a fuller comprehension of the way in which the defendant has been carrying on its business of selling or renting its machines in Virginia.

Upon the trial of the case before the State Corporation Commission a fine of one thousand dollars ($1,000), together with costs, was imposed on the defendant, which was affirmed by the Supreme Court of Appeals of Virginia, and it is from such judgment or decision of the Supreme Court that this writ of error is prosecuted.

It was conceded by the State Corporation Commission and by the Supreme Court of Appeals of Virginia in their decisions that some two-thirds of the sales of machines in Virginia, effected by the defendant, where an order or proposal to buy is procured and a machine *thereafter* shipped into Virginia to fill such order or proposal, was strictly inter-state commerce, and therefore free from objection or complaint.

It was held, however, that where the machine had *already* been shipped into Virginia, as was conceded to be the case in about 30 per cent. of the sales, and thereafter sold or rented, such sale or rental was *intra*-state business, and subject to the license tax imposed by the Virginia statute, notwithstanding the fact that such sale or rental was effected, and only effected through a written proposal to buy or rent the machine, signed by the proposing purchaser in Virginia, which was not operative or effective until it had been sent by the solicitor to the home office of the defendant, formerly in Missouri and now in Ohio, for consideration, approval or rejection, and thereby, in the case of a sale, only became effective as a completed sale, to transfer the title in the machine, upon being approved and signed by the defendant at its home office in another state.

It also appeared by the proofs that an inking ribbon and a narrow strip of paper in the form of a roll, are used on each of the defendant's machines, so that as computations are being made the items and results can be printed on the paper as the work progresses. These rolls of paper were sold for a few cents only, and, as a matter of convenience for the users of machines, and not as a matter of profit to the defendant, the solicitor or salesman kept a few rolls of paper and a few ribbons in stock at his office in Richmond, so that when a user of a machine ran out of paper or ribbons he could get rolls for perhaps three or five cents each, and ribbons for a dollar or less each, without sending to the home office in Missouri or Ohio to procure them, which would cause delay, inconvenience and trouble to the user. As shown by the proofs, the sales of machines amounted to some fifteen hundred dollars per month or more, while the sales of paper, ribbons and other supplies amounted to barely eight dollars per month, or to scarcely more than one-half of one per cent. These sales of paper and ribbon were held by the State Corporation Commission and by the Supreme Court of Appeals of Virginia to be intra-state business, so as to subject the defendant to the imposition of a fine, notwithstanding they were reported to the home office of the defendant, and bills mailed *from the home office* for the purchase price.

It also appears from the proofs that when machines are sold they are guaranteed to be kept in repair, originally for a period of two years, and latterly for a period of one year, and that to make good such guarantee a man was employed by the solicitor or salesman in Virginia, so that when a machine got out of order the matter could be attended to without the delay and inconvenience to the purchaser that would be involved in shipping a machine to the home office of the company, in Missouri or Ohio. The wages of this mechanic or repairman were paid by the defendant. After the guarantee

had expired, a charge was made against the purchaser of a machine for such repairs as he might require, and a bill mailed from the home office. It appears from the testimony of Mr. Grubbs, the solicitor, that this was done wholly for the convenience of the purchasers, and not as a matter of profit to the defendant. In fact, he says that the revenue derived from repair work was not more than 5 per cent. of the expense involved. In other words, the defendant was obliged to pay out 95 cents for the convenience and satisfaction of its customers where 5 cents was received. The repairs, aside from the labor, usually consisted in replacing a broken spring or other small part, and these springs and small parts, belonging to the defendant and in the possession of Mr. Grubbs, did not exceed ten dollars in value. This repair work, inconsiderable in amount and for the convenience of the user of the machine, was held to be doing business in Virginia.

It further appears from the proofs that the solicitor or salesman, Mr. Grubbs, paid the rent for his own office, hired his own stenographer, owned the furniture in his office, paid the taxes on the same, hired his sub-solicitors, paid their salary and expenses, as well as his own traveling expenses, and depended entirely upon his commission on sales for his compensation, as he was paid no salary by the defendant. All of the machines which he had, either as sample machines or as trial machines, in the hands of prospective customes, belonged to and were the property of the defendant. He had no power to make a sale or rental in Virginia, and never made a sale or rental in Virginia, even for cash. Where he took a machine of any other make in order to effect a sale of one of the defendant's machines, he was obliged to secure the approval of the company before the transaction, and when he sold machines of other makes, so traded in, he was obliged to submit a proposal from a purchaser of the same to the defendant for its consideration, approval or rejection. Every

sale or rental in Virginia was a transaction between the *purchaser* in Virginia as *one* principal and the *defendant* at its home office in Missouri or Ohio as the *other* principal.

From the foregoing it appears that the transactions of the defendant, relied on as being in contravention of the statute of Virginia, consisted, first, in the sale or rental of machines *already in* Virginia, and on trial, by the defendant in Missouri or Ohio, and acting from such state, to the purchaser or renter in Virginia, and acting from such state, even though such sales were made under a *written proposal* by the purchaser or renter in Virginia and transmitted to the defendant at its home office in Missouri or Ohio, for consideration, approval or rejection, even when the consideration was to be paid in cash; second, in selling paper and inking ribbons in small quantities for the convenience of users of machines, even though the sales were always reported to the defendant at its home office and the bill mailed therefrom to the purchasers of such paper or ribbons; and, third, in making repairs and paying the wages of the mechanic hired by the solicitor or salesman, even though this was a necessary incident required in making sales, and was for the convenience of users of machines at their places of business, instead of having the machines shipped to the home office of the defendant for repairs.

The Supreme Court of Appeals of Virginia in its opinion split these matters up into different headings, and to show the acts which the court considered as in contravention of the statute of Virginia as to foreign corporations doing business in such State, and as not protected by the Commerce Clause of the Constitution, we will quote the exact language of the court, found at page 95 of the Record, as follows:

> "We are of the opinion that the facts of this case demonstrate beyond a peradventure that the Dalton Adding

Machine Company is doing a substantial part of its business in this State in the following particulars:

"(*a*) In bringing its machines into this State before selling them, and in maintaining a stock of machines for exhibition and trial, and in selling such machines in this state, after their transportation in interstate commerce has been concluded and they have become mingled with the general mass of property in this State;

"(*b*) In renting such machines and collecting rents therefor from its customers in this state at will;

"(*c*) In buying and exchanging machines for machines made by other manufacturers, and in selling such machines so received in exchange at will;

"(*d*) In employing a mechanic in this state and entering into contracts for repairing of machines owned by persons in this state from time to time and collecting the charges therefor;

"(*e*) In keeping on hand in this state certain parts of machines and a stock of paper and ribbons suitable for use upon the machines, which are freely sold from time to time by its agent in Richmond to its customers.

"We think it perfectly apparent that in these particulars the business of the company in this State is not 'commerce among the States,' the freedom of which is guaranteed by the United States Constitution, but that such business, in every essential particular, is business which has been transacted by the company in this State in violation of the statutes referred to."

It will be noted that in the above specifications of business done by the defendant, the *manner* in which it conducts its business is disregarded. No mention is made of the proposals in writing signed by the one principal to the transaction in Virginia, the transmission of such proposal to the other principal to the transaction in Missouri or Ohio, and the acceptance of such proposal by the principal in Missouri or Ohio, when and only when the transaction is completed and becomes an effective contract of sale. This is a vital circumstance which differentiates this case from every case heretofore decided in this court or on the circuit, so far as we can find.

Assignment of Errors.

The assignment of errors will be found at page 96 of the Record, and are as follows:

"The Supreme Court of Appeals of Virginia erred in holding that the defendant is not engaged in inter-state commerce and is therefore subject to a fine for transacting business in the State of Virginia without first obtaining a certificate of authority from the State Corporation Commission and paying the fee required by statute. The said errors are more particularly set forth as follows:

"The Supreme Court of Appeals of Virginia erred in holding and deciding that the defendant is not engaged in inter-state commerce:

"(1) When a machine manufactured by said defendant in Ohio is shipped to Virginia for the purpose of sale and is left on trial with a prospective customer, who subsequently signs an order for the purchase of the identical machine in his possession, and this order is sent for approval to defendant at its Home Office in Ohio, in accordance with the provisions of said order requiring its approval at the executive office of the company in Ohio before it becomes a contract between the parties;

"(2) When the defendant rents to a person in Virginia a machine shipped into the State from Ohio, and collects rent for the use thereof, which rent, in case the renter subsequently decides to buy that particular machine, is credited on the purchase price, and the contract of rental, in accordance with its provisions, is not effective until approved and accepted by the defendant at its office in Ohio.

"(3) When the defendant in making a sale, receives a machine made by another manufacturer in exchange for its machine, and disposes of said machine so received, under a written contract requiring the approval of the defendant at its office in Ohio before such contract becomes effective;

"(4) When the defendant, in fulfilment of its guarantee to purchasers to keep a machine in repair for a definite period, as one year, pays a mechanic in Virginia for looking after the machines, as they get out of order or require repairs, or enters into contracts with purchasers of machines to keep them in order for a stipulated sum

per year, and collects charges therefor, billing the invoices for such charges from its Home Office in Ohio;

"(5) When the defendant keeps on hand in Virginia with its salesman or solicitor certain small parts of machines, ribbons and rolls of paper suitable for use upon said machines which are sold from time to time to the users of its machines in said State, billing the invoices for such sales from its Home Office in Ohio."

BRIEF ON BEHALF OF THE DEFENDANT.

The sale of machines already shipped into Virginia for the purpose of sale by a contract of sale involving an agreement or transaction between parties as principals in different states before any sale can be effected is inter-state business.

Groves v. *Slaughter*, 15 Pet., 511.

Veazie v. *Moore*, 14 How., 573.

United States v. *Swift*, 122 Fed., 531.

Swift & Co. v. *United States*, 196 U. S., 398.

Welton v. *State of Missouri*, 91 U. S., 280.

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 203.

Kidd v. *Pearson*, 128 U. S., 20.

Hopkins v. *United States*, 171 U. S., 597.

Loverin & Brown Co. v. *Travis*, 135 Wis., 331, quoted in 188 Fed., 743.

In re Bergen, 115 Fed., 342.

Lamoine Lumber & Trading Co. v. *Kesterson*, 171 Fed., 982.

Globe Elevator Co. v. *Adams*, 141 Fed., 882.

In re Charge to Grand Jury, 151 Fed., 835.

Western Union Telegraph Co. v. *Kansas*, 216 U. S., 26.

Heyman v. *Hays*, 236 U. S., 185.

Kirmeyer v. *Kansas*, 236 U. S., 570.

. . . . . .

Whether the shipment of the machines is before or after the sale is immaterial, inasmuch as the right to transport machines into the state includes the right to sell.

Brown v. *Maryland*, 12 Wheat., 419.

Leisy v. *Hardin*, 135 U. S., 124.
Brimmer v. *Redman*, 138 U. S., 82.
In re Rahrer, 140 U. S., 559.
Hopkins v. *United States*, 171 U. S., 582.
Pembina Mining Co. v. *Pa.*, 125 U. S., 184.
United States v. *Tucker*, 188 Fed., 743.
Oregon R. & Nav. Co. v. *Campbell*, 180 Fed., 255.
Ex parte Eaglesfield, 180 Fed., 561.
United States v. *Green*, 137 Fed., 187.
Cooper Manufacturing Co. v. *Ferguson*, 113 U. S., 736.
Miller v. *Goodman*, 91 Tex., 41.
Shaw Piano Co. v. *Ford*, 41 S. W., 198.
Goldsburg v. *Carter*, 100 Va., 438.

. . . . . .

The test as to whether a business is inter-state or intra-state is not the right of taxation for domestic purposes.

. . . . . .

Parham v. *Woodruff*, 8 Wall., 123.
Brown v. *Houston*, 114 U. S., 622.
Horn Silver Mining Co. v. *New York*, 143 U. S., 305.
Pembina Consol. Mining Co. v. *Pa.*, 125 U. S., 181.
Kehrer v. *Stewart*, 197 U. S., 60.
Armour Packing Co. v. *Lacey*, 200 U. S., 226.
American Steel & Wire Co. v. *Speed*, 192 U. S., 500.
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 211.

. . . . . .

The inter-state character of the defendant's business is evidenced by the contracts themselves.

In re Charge to Grand Jury, 151 Fed., 838.
United States v. *Swift*, 122 Fed., 531.
Hopkins v. *United States*, 171 U. S., 597.
Veazie v. *Moore*, 14 How., 573.
Welton v. *State of Missouri*, 91 U. S., 279.
Altman Miller & Co. v. *Holder*, 68 Fed., 467.
Holder v. *Altman*, 169 U. S., 89.
Loeb v. *Columbia Township Trustees*, 179 U. S., 480.

. . . . . .

The incidental and insignificant sale of rolls of paper and ribbons by the solicitor, and the repair of machines for the convenience of users, was a mere incident to the defendant's inter-state business, and insufficient to change the character of the business from inter-state to intra-state.

Crutcher v. *Kentucky*, 141 U. S., 59.
Kehrer v. *Stewart*, 197 U. S., 66.

Effect of the Decisions.

The effect of the decisions of the Corporations Commission and of the Supreme Court of Appeals of Virginia is to exclude from the protection of the Commerce Clause of the Constitution all sales of machines shipped into Virginia *prior* to the sale thereof, irrespective of the *manner* of sale, whether by correspondence, solicitation of traveling men or drummers, or in any other manner. The scores of decisions of this court that the *sale* of goods is the *end and object* of interstate shipment, and as much protected as the shipment itself, is ignored and disregarded, and the *priority* of sale to shipment made the *sole test* of interstate commerce. If this is the law, then we respectfully submit that the decisions of this court need revision. If it is not, then the decisions of the Virginia courts in this case need revision and reversal as to their fundamental findings and conclusions.

ARGUMENT ON BEHALF OF THE DEFENDANT.

Before taking up and considering in detail the statements and reasons assigned by the Corporation Commission and the Supreme Court of Appeals of Virginia in their decisions and specifically pointing out the errors which we conceive are contained in the same, we think it best to present our reasons and arguments in support of the fundamental propositions under which we have cited decisions. In doing this, we will quote from the decisions for the convenience of the court.

I.

Machines already shipped into Virginia for the purpose of sale and afterwards selling the same by a transaction involving an agreement between the parties in different states as principals is inter-state business.

If the sale of adding machines by the defendant in the way it has been shown to have done in this case in Virginia, is the carrying on of *inter*-state commerce, then there can be no question as to the inability of the State of Virginia to in any way, shape or form interfere with such interstate business, as scores of decisions in the Supreme and other courts will show. As this, however, is practically elementary, we will content ourselves with simply quoting from one of the recent decisions of this court, to place its language in convenient shape for consideration and reference.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U. S., 26, this court, after considering and citing many cases, said, the italics being those of the court:

> "We are aware of no decision by this court holding that a State may, by any device or in any way, whether by a license tax, in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made, 'depended *in fact* on the value of its property *situated within the State.*' *Postal Telegraph Co.* v. *Adams*, 155 U. S., 688, 696; *Leloup* v. *Mobile*, 127 U. S., 640, 649. On the contrary, it is to be deduced from the adjudged cases that a corporation of one State, authorized by its charter to engage in lawful commerce among the States, may not be prevented by another State from coming into its limits for all the legitimate purposes of such commerce. It may go into the State without obtaining a license from it for the purposes of its interstate business, and without liability to taxation there, *on account of such business.*"

As we understand, Commerce includes everything which contributes to the transference of ownership in personal property—such as negotiations, contracts and sales—from one to another, and everything which tends to bring about or facilitate such transference is a part or ingredient of commerce; and Interstate commerce includes the transference of the ownership of personal property between citizens of different states, or which involves transactions—such as transportations, negotiations, contracts and sales—between citizens of different States, however conducted and brought about. The ingredients, instrumentalities and means of every kind and nature whatsoever, which *contribute* to commerce or to interstate commerce, whether they consist in the shipment, negotiations, contract, sale, delivery, or what not, enjoy the same rights and immunities that commerce, considered as an entity, itself, enjoys, as being simply means to an end.

Both the terms "commerce" and "interstate commerce" have been the subject of frequent consideration and definition by this court, but for the convenience of the court we will quote from a few decisions to see the exact language in which the definitions have been cast.

In *Welton* v. *State of Missouri*, 91 U. S., 280, this court, the italics being ours, said:

> "Commerce is a term of the largest import. It comprehends *intercourse* for the purposes of trade in any and *all* its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of other countries, and between the citizens of different States. The power to regulate it embraces all the *instruments* by which commerce may be conducted."

In *Kidd* v. *Pearsons*, 128 U. S., 20, this court, the italics being ours, said:

> "No distinction is more popular to the common mind or more clearly expressed in economic and political lit

erature than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this Court in *County of Mobile* v. *Kimball*, 102 U. S., 691, 702, is as follows: 'Commerce with foreign countries, and among States, strictly considered, consists of *intercourse and traffic*, including in these terms, navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' "

In *Veazie* v. *Moore*, 14 How., 573, this court, the italics being ours, said:

"Commerce with foreign nations, must signify commerce which in some sense is necessarily connected with these nations, *transactions* which either immediately, or *at some stage of their progress*, must be extra-territorial."

In *Groves* v. *Slaughter*, 15 Pet., 511, this court, after referring to *Brown* v. *Maryland*, 12 Wheat., said:

"Commerce among the States, as defined by this Court, is 'trade,' 'traffic,' 'intercourse' and dealing in articles of commerce between States, by its citizens or others, and carried on in more than one State."

In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., 203, this court, the italics being ours, said:

"Commerce among the States consists of *intercourse and traffic* between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to de-

> termine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the *instrumentalities* by which that commerce may be carried on, and the *means* by which it may be *aided and encouraged*. The subjects, therefore, upon which the power may be exerted are of infinite variety."

In *Hopkins* v. *United States*, 171 U. S., 597, this court said:

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."

Although the above decisions, and many others of a similar purport could be cited, show that interstate commerce includes "the transportation, purchase, *sale*, and exchange of commodities" between citizens of different States, including "the instruments by which such commerce may be conducted," and includes "the *buying* and *selling* and the transportation incidental thereto," and all transactions which "either immediately or at *some stage* in their progress" are "extra-territorial" and all "dealing in articles of commerce between States, by its citizens or others, and carried on in more than one State," and all "intercourse for the purposes of trade" in any and all its forms, "including transportation, purchase, *sale* and exchange of commodities between the citizens of different states," yet we beg to quote from the decisions of a few of the State and Circuit Courts of the United States, to show the terms in which they have defined and expressed the scope and matters coming within interstate commerce.

In *Loverin & Browne Co.* v. *Travis*, 135 Wis., 331, quoted in *United States* v. *Tucker*, 188 Fed., 744, the Supreme Court

of Wisconsin, among other things, the italics being ours, said:

> "It cannot now be doubted that 'commerce' in the Federal Constitution, comprehends all of the *intercourse* between the parties *necessarily or ordinarily* involved in a commercial transaction with reference to merchantable commodities, nor can it be doubted that the solicitation of the purchaser by the seller, the *contract of purchase and sale*, and the actual physical delivery to the purchaser, by whatever means may be selected, are all inherent parts of the intercourse pertaining to trade or traffic in merchandise."

In re Bergen, 115 Fed., 342, Judge Hook, of Kansas, the italics being ours, said:

> "Commerce between the several States means *more* than the mere transportation of commodities. It comprises as well *commercial intercourse* in all of its phases. At the very foundation of interstate trade lies the right of the merchant or manufacturer to *seek* business in other States than that of his domicle by means of solicitation either in person or through traveling representatives."

In *Lamoine Lumber and Trading Co.* v. *Kesterson*, 171 Fed., 982, Judge Wolverton, of Oregon, the italics being ours, said:

> " 'Commerce,' says Mr. Pomeroy (Pomeroy on Constitutional Law, p. 376), 'includes the fact of intercourse and of traffic, and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments*, and places by and in which intercourse and traffic are carried on, and further still, comprehends the *acts* of carrying them on *at* these places, and by and *with* these means.' "

In *Globe Elevator Company* v. *Adams*, 141 Fed., 882, Judge Sanborn, of Wisconsin, said:

> "Interstate commerce comprehends intercourse for the purpose of trade, including transportation, purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraces all the instruments by which commerce may be conducted."

In re Charge to Grand Jury, 151 Fed., 838, Judge Speer, of Georgia, after quoting from *Gibbons* v. *Ogden*, 9 Wheat., and *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S., among other things, the italics being ours, said:

> "If any commercial transaction reaches an *entirety* in two or more States, and if the parties dealing with reference to that transaction *dealt from different States*, then the whole transaction is a part of interstate commerce of the United States. *United States* v. *Swift*, C. C., 122, Fed., 529."

In *United States* v. *Swift*, 122 Fed., 531, Judge Grosscup, of Illinois, the italics being ours, said:

> "Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—*all the initiatory and intervening acts, instrumentalities and dealings*—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan* v. *Titusville*, 153 U. S., 289, 14 Sup. Ct., 829, 38 L. Ed., 719. The whole transaction from *initiation to culmination* is commerce."

On page 533, Judge Grosscup said:

> "Unquestionably it is interstate commerce when purchasers from other States buy *directly* from the defendants' and have the meats shipped to them by the vendors. The *situs* of such a transaction, both as to initiatory intercourse, and as to transportation in furtherance of the exchange, includes a state other than the one from which the defendants deal.
>
> "*I think the same is true of meat sent to agents, and sold from their stores.* The transaction in such a case, in reality, is between the *purchaser* and the agent's *principal*. The agent represents the principal at the place where the exchange takes place; but the transaction, *as a commercial entity*, includes the principal, and includes him *as dealing from his place of business*. Indeed such

> privity exists between the principal and the transaction, that he could, at the instant, sue upon the transaction in the Federal Courts; nor have I any question that if the conditions of this case were reversed, so that defendants were invoking the shelter, instead of seeking to escape, the obligations of the commerce clause, Federal law would be equal to the protection asked."

In *Swift & Co.* v. *United States*, 196 U. S., 398, this court, in affirming the decision of Judge Grosscup, as to *both methods of sale* described by him, as quoted above, and in considering the allegations of the bill, the italics being ours, said:

> "It is said that this charge is too vague and that it does not set forth a case of commerce among the States. Taking up the latter objection first, commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption *necessary to find a purchaser* at the Stock Yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the *purchase* of the cattle is a *part* and *incident* of such commerce."

The above decisions, from the Supreme Court and others, show that everything which is *necessary* or *convenient* or which *facilitates* the transfer of the ownership of goods or merchandise from one to another, falls within the meaning and scope of commerce, and that interstate commerce includes everything that commerce includes, when it involves *dealings* between parties in *different* states, in relation to goods or personal property shipped from one State into another. It includes the shipment, and the successive steps of solicitation, signing a proposal or offer to buy by a purchaser in one state, the approval and acceptance of such offer and proposal by a seller in another state, and all the intervening

been effected, if the transaction involve an interstate shipment for the *purpose* of sale, and if the sale involve a transaction between the *owner* of the machine in *one* State and the *purchaser* in *another*, and not a mere sale *in* the State of the purchaser by an agent, solicitor or representative of the owner, invested with *authority and power* to make sales, without referring the matter to his principal in another State, we think applicable all those decisions which hold that the sale is a mere *incident to the right* to import or ship the machine or goods into the State. The books are full of cases where the shipment from a foreign country or from a sister State has *preceded* the sale; and the courts have uniformly held that the right to sell is a necessary *consequence* of the right to ship. Although this may be considered as so thoroughly adjudicated as to make the citation of authorities almost the subject of an apology, yet we beg to refer to a number of cases, so that the court will have them convenient for consideration.

The leading case on the subject is that of *Brown* v. *Maryland*, 12 Wheat., 419, decided by this court in 1827. This great case announced two leading propositions—one, that goods imported from a foreign country could not be taxed by a State until they had been sold, or by some other act commingled with the mass of property in the State; and the other, that a right to import or ship into a State *necessarily carries the right to sell* in the State *after* the importation or shipment. Afterwards, the first of these propositions relating to taxation was held inapplicable to goods imported from a sister State, though it remained as to goods imported from a foreign country; but the second proposition—that the *right to ship* goods into a State necessarily carried with it the *right to sell* without let or hindrance on the part of the State—has never been changed or modified, and stands as the established law today.

On page 446 of the opinion in *Brown* v. *Maryland,* this court, speaking through Chief Justice Marshall, in discussing the power of the Federal Government to regulate commerce with foreign Nations and among the several States, the italics being ours, said:

> "If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the *sale* of those articles which it introduces. Commerce is intercourse: One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power *to authorize a sale* of the thing imported? Sale is the *object* of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

This court was certainly contemplating and speaking of the right to sell *after* the importation of the commodity into the State.

In *Bowman* v. *Chicago & etc., Railway Co.,* 125 U. S., 499, which involved the shipment of goods from one State to another, this court, the italics being ours, said:

> "The very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the *sale* and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland,* 12 Wheat., 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion *would be the same* in case of commerce among the States."

Here again the right to *sell* the goods shipped into the State *after* the shipment was the subject under consideration. To avoid repetition, we will simply say that in the cases following the shipment *preceded* the sale, and yet the *sale* following the shipment was held to be protected by the Commerce Clause of the Constitution.

In the above case, Mr. Justice Field delivered a separate *concurring* opinion, in which, the italics being ours, he said:

> "That the right of importation *carries with it* the right to sell the article imported, does not appear to me doubtful. Of course, I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce and it may be destroyed or its use prohibited. To assert that, under the Constitution of the United States, the importation of an article of commerce cannot be prohibited by the States, and yet to hold that *when* imported its use and *sale* can be prohibited, is to declare that the right which the Constitution gives is a barren one, to be used only so far as the *burden* of transportation is concerned, and to be denied so far as any *benfits* from such transportation are sought. The framers of the Constitution never intended that a right given should not be fully enjoyed."

In *Leisy* v. *Hardin*, 135 U. S., 124, this court, in dealing with a subject of interstate commerce, after citing and quoting from *Gibbons* v. *Ogden*, 9 Wheat., 1, and *Brown* v. *Maryland*, 12 Wheat., 419, and other cases, said:

> "Under our decision in *Bowman* v. *Chicago, &c., Railway Co., supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become commingled in the common mass of property within the State."

In *Brimmer* v. *Rebman*, 138 U. S., 82, this court, in considering a Statute of Virginia, in relation to the importation and

sale of fresh meats shipped into the State without first having the same inspected, said:

> "The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of the State is, when applied to the people or products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri,* 91 U. S., 275, 281; *Railroad Co.* v. *Husen,* 95 U. S., 465; *Minnesota* v. *Barber,* above cited."

In re Rahrer, 140 U. S., 559, this court, after citing *Bowman* v. *Railway Co.,* 125 U. S., 465, and *Leisy* v. *Hardin,* 135 U. S., 100, and stating that the Laws of Iowa, under consideration in those cases, were enacted in exercise of the police power of the State, the italics being ours, said:

> "Hence it was held that inasmuch as interstate commerce, consisting in the transportation, purchase and *sale* and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, but in such a way as to allow the laws of the State to operate upon it. Congress thereby indicated its will that such commerce should be free and untrammeled and therefore that the laws of Ohio, referred to, were inoperative, in so far as they amounted to regulation of foreign or interstate commerce, in inhibiting the reception of such articles within the State, *or their sale upon arrival* in the form in which they were imported there from a foreign country or another State."

In *Hopkins* v. *United States,* 171 U. S., 582, where the defendants—brokers—were prosecuted as an illegal combination, under the Anti-Trust Law, on the ground that they had entered into a combination or conspiracy in the purchase and

sale of cattle and other stock shipped to the Kansas City Yards for sale, this court, the italics being ours, said:

> "The selling of an article *at its destination,* which has been sent from another State, while it may be regarded as an *interstate sale* and one which the *importer* was entitled to make, yet the services of the *individual* employed at the place where the article is sold are not so connected with the subject sold as to make *them* [the services] a portion of interstate commerce, and a combination in regard to the amount to be charged for such services is not therefore, a combination in restraint of that trade or commerce."

In *Pembina Mining Co.* v. *Pennsylvania,* 125 U. S., 184, this court, in considering a Statute of Pennsylvania, the italics being ours, said:

> "It is not perceived in what way the Statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon transportation into Pennsylvania of the products of the corporation, *or upon their sale in the Commonwealth.* It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents or employees."

But without citing other cases in this court, and there are many, we think it cannot be denied that, ever since the case of *Brown* v. *Maryland,* 12 Wheat., 419, it has been the settled law that the *sale* of an article, shipped for the *purpose* of sale into a State from a sister State, *after the same has arrived there,* is a part of interstate commerce as much as the *shipment* of the article itself into the State, as otherwise, as expressed in many decisions, the shipment would be rendered nugatory and futile. Hence we say that the *time* of shipment, whether the shipment of machines by the defendant into Virginia for the purpose of sale and afterwards sold in Virginia by the *defendant* in Missouri or Ohio, and not by the solicitor or salesman himself, *from its Home Office* in Missouri or Ohio, is

immaterial—the shipment may *precede* the sale or *succeed* it, without affecting the *character* of the transaction as an act of interstate commerce. This has been held in various cases in the Circuit and State Courts, as we think an examination will show.

In *United States* v. *Tucker*, 188 Fed., 743, Judge Sater, of Ohio, the italics being ours, said:

> "Neither a sale nor the *place* of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct to commerce, constitute a transaction interstate commerce. A sale, *the parties to which are from different States*, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce, whether the contract of sale be made in the one State or the other, *or made before or after shipment*.
>
> "Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any State, or territory, or the District of Columbia, with those of another political division of the United States which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce."

In *Oregon R. & Navigation Company* v. *Campbell*, 180 Fed., 255, Judge Wolverton, of Oregon, after stating and quoting *Leisy* v. *Hardin*, 135 U. S., 100, the italics being ours, said:

> "Nor does it seem to me that the principle applied in the Tax Cases is wholly applicable here. The principle rests, not upon the fact that the property taxed has *ceased* to be interstate commerce, but upon the condition that it has, in the course of its transportation, arrived at its destination, is at rest and enjoying the protection which the laws of the State afford, and is taxed without discrimination like all other property. Such is the doctrine of *American Steel & Wire Co.* v. *Speed*, 192 U. S., 500, 24 Sup. Ct., 365, 48 L. Ed., 538. The court in this case adheres to the rule announced in *Leisy* v. *Hardin*, *supra*, that the *fact of sale at point of destination* was essential to relieve the property from the character of interstate com-

merce, but holds that, notwithstanding the property *continues* to be interstate commerce, it may yet be *taxed* by the State in which it has come to rest under the conditions just narranted. The doctrine has been reaffirmed in *General Oil Company* v. *Crain*, 209 U. S., 211."

In *Ex parte Eaglesfield*, 180 Fed., 561, Judge Quarles, of Wisconsin, after quoting from *Gibbons* v. *Ogden* and *Brown* v. *Maryland*, and after citing and quoting from many cases, the italics being ours, said:

"From the showing made and the authorities herein considered, I deduce the following propositions:

"First. The applicant was engaged in interstate commerce under a valid coasting license which conferred upon her a right so to do.

"Second. The right to trade *necessarily includes the right to sell.*

"Third The potatoes, in the hold of the vessel, remained an import *until she had sold and delivered* them on the dock."

In *United States* v. *Green*, 137 Fed., 187, Judge Ray, of New York, the italics being ours, said:

"As early as the decision of *Brown* v. *Maryland*, 12 Wheat., 419, 6 L. Ed., 673, it was held that interstate commerce could not be stopped at the external boundaries of the State, but must enter the interior of the State *and include a sale therein.* This power to *sell*, as a part of interstate commerce, was applied in that case to foreign commerce, but Chief Justice Marshall said the power would be the same as applied to commerce between the States."

In *Miller* v. *Goodman*, 91 Tex., 41, the Supreme Court, in considering a case involving the question as to whether the transaction was inter-state or intra-state—the goods sold being in Texas at the time of sale—said:

"It matters not whether the goods were sold before they were shipped or shipped to the state and then sold. It is equally inter-state commerce" (citing cases).

We have quoted from a number of decisions to show the universal and unvarying adoption and application of the second of the two great propositions established as far back as 1827, in the case of *Brown* v. *Maryland,* namely, that the *sale* of goods is not only included under the word "commerce," but that the right of importation or shipment of merchantable goods from a foreign country or from one State to another necessarily includes the right to *sell* the goods *after* they have been imported or *shipped into the State* under the Commerce Clause of the Constitution. The right to *sell* cannot be *divorced* from the right to import from foreign countries or to ship *from* one State *into* another, and the right to transport goods into any State, and the *consequent* right to sell *after* the importation or shipment, is a right secured to every person, firm or corporation by the Constitution of the United States. It follows, therefore, that the *sales* of machines shipped by the defendant into the State of Virginia for the purpose of sale, *after* they arrive there, by a contract between the *purchaser* in Virginia and the *defendant* in Missouri or Ohio, and not by the *solicitor* or salesman *himself* in Virginia, but requiring the *participation* of the defendant dealing from Missouri or Ohio, is protected by the Commerce Clause of the Constitution.

This distinguishes this case from such cases as *Emert* v. *Missouri,* 156 U. S., 296, 310, where the salesman *himself* sold sewing machines which he took with him in his wagon, and actually *sold,* transferred title, and delivered the machines himself to such purchasers as he found in Missouri, without *referring* the matter to his *principal* in another State, to actually *make* the sale—where the property was delivered and the title transferred *by the salesman himself,* without merely procuring an order or *proposal* to purchase, which was then transmitted to his principal for consideration and acceptance; and from such cases as *Singer Sewing Machine Company* v.

Brickell, 233 U. S., 304, where in all the counties of Alabama except the County of Russell, the sales of sewing machines were made by the *salesman* himself and delivered from the *owners'* stores or regularly established *places of business* in the State, without involving a reference to the owner in another State to *actually make* the sale, and so without the introduction into the transaction of a *contract or dealing* between the two principals in their respective places of business in different States. As already said, we know of no case in which the particular course of business and dealing as that presented in *this* case was involved; in which the solicitor or salesman had no *power* or authority to make a sale, and never *did* make a sale, even of the machines which were present in the State, and which the purchaser, after test or trial, bought and could *only* buy by *dealing directly* with the manufacturer and owner at its place of business in another State, instead of with the *solicitor* or salesman *within* the State.

If the defendant has the right to *ship* its machines from Missouri or Ohio into Virginia, as articles of interstate commerce, and if it has the right to *sell* the goods in Virginia as an *incident and consequence* of the right to ship them into Virginia, and we submit that under the decisions of this Court and others there can be no question as to *either* of these rights, then the shipment and sale, *taken together,* constitute interstate business or commerce, and the State has no right, by imposing penalties under the Statutes of Virginia, or otherwise, to interfere with such interstate business of the defendant. The sale of the machines, which the defendant has shipped into the State of Virginia, for the purpose of sale, by a contract between the *purchaser* in Virginia and the *defendant* in Missouri or Ohio, both acting as *principals* and dealing directly *with each other* from their respective states, is as much a part or *ingredient* of interstate commerce as the shipment itself and is equally protected under the Commerce Clause of the Constitution.

As already pointed out, it is established that every sale of a machine in Virginia is the subject of a written contract, which is neither a *Virginia* contract nor a *Missouri* or Ohio contract, but is an *interstate* contract, in which the respective parties or principals reside respectively in Virginia and Missouri or Ohio, so as to constitute a transaction of interstate commerce or business, as distinguished from a domestic business.

We have dwelt upon the right of the defendant to make a *sale* of its machines *in* Virginia *after* they have been shipped there for the purpose of sale, in view of the fact stated in the answer and proofs, showing that in some cases the purchaser is allowed to purchase and retain *the particular* machine which he had been permitted to test and try at his place of business for a few days, either voluntarily or by way of rental, to determine its capacities, adaptation to his business, superiority over machines of other makes, and matters of that kind, and where, having become familiar with that particular machine, he desired *it* instead of another directly shipped to him from Missouri or Ohio, which the answer says occurs perhaps in three cases out of ten. The answer and proofs show that, owing to the *nature* of the machine, which is a highly technical and specialized species of adding, computing and calculating machine, it is *necessary* for the salesman or solicitor, in order to secure offers or proposals for the purchase of machines, to *show* the same to prospective purchasers, and in some cases to allow them to *try* the machines, by installing them in their offices or places of business for a few days or a limited period, to determine their adaptability and value to them in their particular business, but, nevertheless, as the answer and proofs show, when a party who has tried or tested a machine already shipped by express into the State of Virginia to be sold, and after he has tested and tried it as above explained, and desires to purchase or rent the particular machine which he has tried and has in his pos-

session, he cannot do so of the solicitor in Virginia, but is *required to sign a written offer* or proposal to purchase or rent the machine, in which proposal the particular machine is designated in the offer or proposal which he signs, by specific description, referring to it by its distinguishing style and serial number, *after which* his offer or proposal is sent through the mails to the defendant in Missouri, or Ohio, for consideration and acceptance, if on investigation the financial status of the purchaser, the location, the object and surrounding circumstances, be satisfactory, so that there is *no sale* of the machine or transfer of the ownership in it to such purchaser *until* his offer or proposal has been accepted and signed in Missouri, or Ohio, so as to become a *completed and effective contract*, segregating such particular machine from all others, and specifying and relating to it alone, and to no other machine whatsoever. The answer and proofs show that this has been the invariable practice in all those cases—perhaps in three cases out of ten—where the purchaser is allowed to buy and retain the machine already shipped into Virginia for the purpose of sale, and which he had tried and tested before signing the offer or proposal to buy or rent the same. In all of these cases, as well as in all others to fill orders already signed before the shipment of a machine, there is a *shipment* of a machine from Missouri or Ohio into Virginia, the only difference being that in the one case the shipment is made for the *purpose* of a sale and in anticipation of a sale, while in the others the shipment is made *after* the offer or proposal to purchase has been secured by the salesman or solicitor. We find no decision of the courts which holds that the sale of a machine *already* shipped into a State for sale, by a contract entered into between the *principals*, dealing *from their respective* States, instead of by the solicitor or salesman *himself*, is not an interstate sale, but a local sale, so as to be without the protection of the Interstate Commerce Clause of the Constitution.

In *Goldsburg* v. *Carter,* 100 Va., 438, in a case where a party had made a contract in another State involving the sale of lands in Virginia, the Supreme Court of Appeals of Virginia, in 1902, in construing Section 1105 of the code, said:

> "The prohibition in the statute is against doing business *here* and not against doing business *abroad* which relates to property *in* this State."

We call attention to the above case, even though a different species of property was involved, because it seems to us to clearly recognize that the *situs* of the property is immaterial when the contract relating to the safe is *extra*-territorial, as we insist is the case with the contracts by the defendant for the sale of machines in Virginia.

III.

The test as to whether a business is inter-state or intra-state is not the right of taxation for domestic purposes.

We are not here discussing the right of a State to *tax* the machines themselves, even though they are subjects of inter-state commerce, after they have been shipped into a State and reached their destination and come to a state of rest, by the imposition of the usual *ad valorem* tax, the same as imposed upon other goods of like character, because that is not the question involved in this case, and we are not now concerned with that phase of the matter. To the class of cases bearing on the right of a State to impose a general *ad valorem* tax on articles constituting interstate commerce, after the same have reached their destination and come to a state of rest in the State, even though they remained unsold and in the original package, or right to impose a merchant's or *occupational* tax upon the *agent* or dealer in the State selling such articles, whether made in the State or shipped in from a sister State, without discrimination between the two, or the right

to impose a *franchise* tax on a foreign corporation maintaining an *office* in the State for its general corporate purposes, and carrying on *therefrom* a purely domestic business in the State, may be referred the cases of *Parham* v. *Woodruff*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 211; the *Horn Silver Mining Company* v. *New York*, 143 U. S., 305; *Pembina Consolidated Mining Company* v. *Pennsylvania*, 125 U. S., 181; *Kehrer* v. *Stewart*, 197 U. S., 60; *Armour Packing Co.* v. *Lacy*, 200 U. S., 226; *American Steel & Wire Company* v. *Speed*, 192 U. S., 500; and other similar cases that might be cited. In none of these cases, however, was the foreign corporation engaged *merely* in selling its goods in the State, whether already shipped into the State or not, by procuring *orders or proposals* to buy the same, through a solicitor or salesman who is legally merely a "drummer" to procure orders or *proposals* to buy the same, which orders were *afterwards* transmitted to the owner in *another* State for approval and acceptance *before* passing title to the goods, requiring, in every instance, *before* a sale or transfer of title, an *interstate* transaction or contract involving parties dealing *with each other as principals from different States*, as in the case now before the Court.

We deem it unnecessary to quote from more than two or three of the cases cited above in support of our contention that the right to impose the usual *ad valorem* tax on goods after they are transported from one State into another, and while still invested with the character of interstate commerce, is not determinative of their character—does not establish that the shippers are not entitled to claim the protection of the Commerce Clause of the Constitution as to such goods in all other respects.

In *Brown* v. *Houston*, 114 U. S., 632, this Court said:

"It may be laid down as the settled doctrine of this

court, at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations.

"This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon, the free introduction of the plaintiff's coal from the state of Pennsylvania into the state of Louisiana, and the free disposal of the same in commerce in the latter state; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the state; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subject of commerce, is entirely within the power of the state until congress shall see fit to interfere and make express regulations on the subject.

"As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal *as* a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed while it was in a state of transfer through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year, 1880, as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated."

In *American Steel & Wire Company* v. *Speed*, 192 U. S., 519, the Supreme Court said:

"Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods

into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the state for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown* v. *Maryland*. *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622. The doctrine upon which the cases rest shows this, that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one state to another. The several states, therefore, not being controlling as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situation within the state."

IV.

The interstate character of the defendant's business is evidenced by the contracts themselves.

As already said, there is in this case a particular circumstance that characterizes the complainant's business, and stamps it with the unmistakable *indicia* of interstate commerce that is not to be found in any of the cases heretofore decided in any of the courts that we have been able to find.

As we have repeatedly pointed out, the salesman or solicitor in Virginia has no *authority or power* to sell a machine and has never *sold* a machine *in* the State of Virginia. His power and authority are limited to soliciting offers or proposals to buy machines, which are then sent to the company at its home office in Missouri or Ohio for approval and acceptance, or *rejection* if the financial responsibility of the proposed purchaser, the place where the machine is to be used, the object

in making the purchase, whether for *bona fide,* legitimate use, or for copying, imitating or infringing the same, or other circumstances seem to justify. No *contract* for the sale of a machine is *made* by the salesman or solicitor *in* Virginia, but simply an *offer* or proposal secured, the same as in the case of any ordinary drummer or solicitor, so that the proposed contract of purchase is not ripened into a *contract* until after it has been transmitted to the home office and approved and accepted by the defendant. This makes the contract strictly and purely an *interstate* contract, in which the principals are dealing with each other from different states, which exactly brings the contract within the definition of interstate commerce or business, as defined by Judge Speer, *in re Charge to Grand Jury,* 151 Fed., 838, where he says that "If any commercial transaction reaches an *entirety* in two or more states, and if the parties *dealing* with reference to that transaction dealt from *different* states, then the *whole transaction* is a part of interstate commerce of the United States"; and as defined by Judge Grosscup in *United States* v. *Swift,* 122 Fed., 531, where he said that "The transaction in such case, in reality, is between the *purchaser* and the agent's *principal,*" and that "The agent represents the principal at the place where the exchange takes place, but the *transaction* as a commercial entity, includes the *principal,* and includes him as *dealing* from his place of business"; as defined by this court in *Hopkins* v. *United States,* 171 U. S., 597, where the court said that interstate commerce includes the "sale and exchange of commodities *between the citizens* of different states"; and as defined by this court in *Veazie* v. *Moore,* 14 How., 573, where it is said that interstate commerce includes "transactions which either immediately, or at *some stage* of their progress, must be extra-territorial"; and as defined by this court in *Welton* v. *State of Missouri,* 91 U. S., 279, where the court said that interstate commerce includes the "sale and exchange of commodities between the citizens of other coun-

tries, and *between the citizens* of different states"; not to quote other specific definitions.

Substantially, not to say literally, the *character of contract* involved in the defendant's method of doing business was involved in the case of *Aultman, Miller & Co.* v. *Holder*, 68 Fed., 467, decided by Judge Swan, of Michigan, which was an action of assumpsit by the Ohio Company against Holder, the Michigan agent, for a balance due from him. The Michigan statute contained a provision invalidating "contracts made in this state" by a foreign corporation which had not filed its articles of association in Michigan and paid the franchise tax imposed by the statute, and the defendant relied on such statute. The contract with the agent in that case contained a provision that "*This contract not valid unless countersigned by our manager at Lansing, and approved at Akron.*" The question arose as to whether the contract which had been signed by the agent in Michigan and then sent to the company at Akron for approval and signature, was to be considered as made in *Michigan* or as made in *Ohio*. Judge Swan, in deciding the question, the italics being ours, said:

> "The questions arising in this case have been argued with great learning and ability by counsel, and, although the discussion has taken a wide range, it has left for determination but two inquiries: (1) Was the contract sued upon made in this state? (2) Is the statute upon which the defense is founded a regulation of commerce obnoxious to the constitutional grant of the power over that subject conferred upon congress?
>
> "In regard to the first of these questions, it will be noticed that the provision of the statute upon which reliance is had for the avoidance of the defendant's liability for the sum found due from him to the plaintiff limits its penalty to 'contracts made in this state after the first day of January, 1894.' This contract was made, it is admitted, after that date. What was the *locality* of its execution? It did not become a contract until all the parties executed it. By its express provision it was not to be valid until countersigned by the agent of the plain-

tiff at Lansing, and approved at Akron, Ohio. This latter requisite—the approval of the plaintiff—is the crowning act of its consummation, as expressing the agreement of the parties. It, therefore, was not made until, by plaintiff's approval, it was perfected and adopted. Until then it was an imperfect obligation, having no force whatever. The act which gave it vitality was performed *outside* of the state of Michigan, *i. e.*, in the state of Ohio. It seems clear, therefore, that it was not a contract made *in* this state, within the prohibition of the statute. The question of construction of the language of the statute is analogous to that arising upon the alien labor acts, which have been the subject of much discussion in the Federal Courts. In cases founded on those acts, a vital element of the offense is the making of a contract in a foreign country with a non-resident alien, previous to the immigration or importation of such alien into the United States, to perform labor or service in this country, and in pursuance of which such non-resident alien comes to the United States and enters upon the performance of the contract. There, as here, the character of the act is made to depend upon the *locality* of the execution of the prohibited contract. It is perfectly lawful, notwithstanding the alien labor acts, to contract with an alien within the jurisdiction of the United States, *U. S.* v. *Craig*, 28 Fed. 795, 799; *U. S.* v. *Edgar*, 45 Fed. 44; same case on error, 1 C. C. A. 49, 48 Fed., 91. Thus, in the Michigan statute, no penalty is directed against the execution of a contract *outside* of the state by a corporation which has not complied with the provisions of the acts of 1891 and 1893. The inquiry, therefore, is not by what law the contract is to be construed—whether that of the place of its execution or that of its performance—or of the form in which suit may be brought upon it. The single question is, where was it executed? And upon the admitted facts of this case, evidenced by the stipulation, the concessions of counsel, and the fair construction of the clause 'approved at Akron,' but one answer can be given to this inquiry. It became the *contract of the parties at Akron, Ohio*, and was not made in the state of Michigan, within either the language or the spirit of the act of the legislature pleaded in defense. Giving to the language of the act its natural and obvious meaning, the phrase 'made in the state of Michigan' can have but one interpretation, and must be held to designate contracts there perfected by the assent

of all parties. It is not necessary to invoke the rule that a penal act is to be strictly construed, for the language employed has excluded all doubt of the intent of the legislature. The contract sued upon is not avoided by the act of 1893.

"2. Upon the second question, as to the constitutionality of the state statute, there is, in my judgment, as little doubt as upon the first. By the contract sued upon the defendant 'is hereby authorized to sell Buckeye mowers, reapers, and binders, and extra parts thereof, in the following territories, viz., Laingsburg and vicinity and Elsie and vicinity, including the townships of Washington and Elba, in Gratiot County, and Chapin in Saginaw County, and the west half of Fairfield in Shiawasee County, for and during the season of 1894.' The defendant, therefore, was not *a resident local agent* of the plaintiff, and, although selling on commission, was really, as the contract contemplates, nothing more than an itinerant vendor in the territory specified. The fact that the company had a warehouse at Lansing, where it stored its implements, and the necessary 'repairs' or parts of the machines, which it manufactured and sent here for sale, in order that it might meet the demands of those having its machines to supply such repairs or parts, is immaterial in this case. Without doubt, property so stored and kept within the State of Michigan, for the convenience of the company and the promotion of its business, in affording facilities to its customers for the purchase and repair of the implements which it manufactured and sold, unless these were merely in transit for delivery to customers here, would authorize the state to tax such property for the protection it received, but the right to taxation of such property is not in question here. The state statute really imposes a tax upon the corporations included within its provisions for the privilege of selling their wares in Michigan, and therefore is obviously a tax upon interstate commerce within the provisions of the federal constitution, and the decisions of the Supreme Court of the United States."

The above case was appealed, and the decision of this court is reported in *Holder* v. *Aultman*, 169 U. S., 89. This court affirmed the decision of Judge Swan as to the *locus* of the con-

tract, which entitled the appellee to an affirmance of the decision without the necessity of considering the constitutional question involved. The question decided by this court was as to whether the contract had been made in Michigan or in Ohio. On page 89 this court, after stating the facts, the italics being ours, said:

> "A contract was made when, and not before, it has been executed or accepted by *both* parties so as to be binding upon both."

On page 90, after reciting that the contract was drawn in Michigan, and that it contained the words "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approvad at Akron, Ohio," this court, the italics being ours, said:

> "The Circuit Court found, as facts, that the parties entered into the contract on April 29, 1894, which was the date of its approval at the plaintiff's Home Office in Ohio; and that it was executed, accepted and approved, as set forth therein, and in the endorsement thereon.
>
> "Whether, therefore, we look to the contract itself, to the plaintiff's declaration, or to the findings of fact by the court, it clearly appears that the contract, when, after being drawn up in writing and signed by the plaintiff's local agent, it was tendered to the defendant and assented to and signed by him in Michigan, contained a distinct stipulation that it was not valid unless, not only signed by the plaintiff's manager in Michigan, but also approved at the plaintiff's principal office in Ohio; and that it was on April 29, 1894, and *at Akron in the State of Ohio*, that the contract was approved by the plaintiff's secretary at its principal office, and *then and there*, for the first time, became a valid and binding contract between the parties. It cannot, therefore, be considered as 'made,' within the meaning of the statute in question, at any earlier time, or *other* place.
>
> "The approval at the plaintiff's Home Office was not a ratification by the plaintiff of an unauthorized act of one of its agents; for each of its agents, Gillett in first signing the contract, and Worth in countersigning it, appears to have acted within the strict limits of his

> authority. But the final *approval* by the plaintiff *itself* was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the papers, was a necessary step to *complete* the execution of the instrument by the plaintiff, and to make it *a valid and binding contract* between the parties."

The above case is cited with approval, as to the point that the contract was made in the State of the manufacturer, where it was required to be sent for approval, in *Loeb* v. *Columbia Township Trustees,* 179 U. S., 480, where this court, in considering the question of jurisdiction, said:

> "The views expressed by us as to the scope of the Act of 1891 are supported by *Holder* v. *Aultman,* 169 U. S. 81, 88. That was an action in the Circuit Court of the United States for the Eastern District of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: 'The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate inter-state commerce. 68 Fed. Rep., 467.' "

The above decisions by Judge Swan and of this court, to cite no other cases, plainly show that the offers or proposals to purchase or rent machines, which the defendant's salesman or solicitor procures in Virginia, containing a provision that "This order subject to approval of the company" or "Not effective unless approved by the company," and which are sent to the home office and approved and accepted in Missouri or Ohio, are not contracts "made" in the State of Virginia, but outside of the state; and as they are contracts between prin-

cipals, one dealing from Virginia, and the other from Missouri or Ohio, in relation to a machine *shipped* in interstate commerce, they are interstate *contracts*, made in *furtherance and consummation* of interstate business. Owing to the *interstate* character of the contracts and *dealings* by which the machines are sold, and the ownership transferred from the manufacturer *in* Missouri or Ohio to the purchaser *in* Virginia, they entitle the manufacturer to invoke the protection of the commerce clause of the Constitution. The nature of the contract and of the transaction between the parties clearly stamps the business as interstate commerce.

Although the defendant has the right, as we contend, under the authorities quoted, to ship or transport its machines into Virginia for the purpose of sale, and of soliciting purchasers for the machines *after* they have arrived in Virginia, and to fill the orders obtained for them by the delivery of machines already shipped into Virginia for the purpose of being sold, as well as to solicit orders for machines *before* they have been shipped, yet the circumstance that the *final approval* of the proposed contracts by the defendant itself "was an act which, according to the express stipulation of the parties," contained in each and every offer or proposal to purchase a machine, "was a necessary step to complete the execution" of the contract, "and to make it a valid and binding contract between the parties," is sufficient in and of itself to render the contract or transaction one of interstate business, protected by the Constitution, and exempt from subjection to the Statutes of Virginia, and from the power of the State to interfere in any way with the business of the defendant so carried on.

V.

The incidental and insignificant sale of ribbons and rolls of paper by the solicitor, and the repair of machines for the convenience of users, was a mere incident to the defendant's interstate business and insufficient to change the character of the business from interstate to intrastate.

As already explained, there have been a few ribbons and rolls of paper kept on hand at the office of Mr. Grubbs, the solicitor or salesman, to supply to users who ran out and needed others. This was for the convenience of the users and to save the time that would be required in sending an order to the Home Office and having them shipped from there. Mr. Grubbs says that the charge for these ribbons and rolls of paper were all billed from the office, according to his recollection. He says that "In some cases receipted invoices were mailed where the cash was sent in. In other cases, the invoices were sent out in the usual way where the cash had not been sent in; but in every instance I believe that the supplies have been billed from the Home Office." (Rec. 44.)

In reference to the repairs done to machines where a spring was broken or a screw displaced, or something of that sort, Mr. Grubbs testified that: "In view of the fact that no charge is made for repairing any of the machines for the first two years, on account of the machines having been guaranteed for two years, the receipts as a result of repairs would amount to certainly less than 5 per cent. of the amount of the actual expense of making the repairs." (Rec. 45.)

He also says that it is "absolutely necessary," in order to sell the machines, to agree to keep them in repair. He says: "A prospective purchaser in no instance would buy a machine constructed of the complicated mechanism that an adding machine is constructed of unless he were assured of the fact that

in case the machine got out of order it would be promptly repaired. If we did not agree to keep the machine in repair, we would be unable to sell it." (Rec. 45.) Mr. Grubbs was asked why the defendant repaired machines when it involved a loss, and replied: "Purely for the accommodation of our customers." (Rec. 48.) In answer to a question as to the nature of these repairs, or rather as to the parts of the machines involved, he said: "Principally small springs, as far as the parts are concerned; that is about the only part that gets out of order and has to be replaced—springs. Sometimes a screw gets loose and has to be tightened. Very few parts are used." (Rec. 49.) As to the parts that he kept on hand, so as to be available for immediate use, he said: "A very small supply of screws and springs that might get out of adjustment" (Rec. 49); and as to their quantity or value on hand, he said: "I certainly think it would not amount to $10.00." (Rec. 49.)

The sale of ribbons and rolls of paper, and the keeping on hand of a small supply of screws and springs, and paying a repairman or mechanic, employed by the salesman but paid by the defendant, all for the *convenience of customers* and users in Virginia, and at a *loss* to the defendant, is certainly a small matter on which to base a charge for violating the Virginia Statute. As already pointed out, the sale of ribbons and paper amounts to scarcely more than one-half of one per cent. of the defendant's business. This trifling sale of ribbons and paper and doing repair work, even if they be worthy of consideration at all, are susceptible of two answers.

First. The defendant has the same right to ship these rolls of paper and supplies into Virginia for the purpose of sale, and of afterwards selling them, that it has to ship machines into Virginia for the purpose of sale and afterwards selling them. As we have pointed out in numerous decisions, the right to *sell* in Virginia is a necessary consequence and inci-

dent to the right to *ship* into Virginia. There can be no question that under the interstate commerce clause of the Constitution the defendant has the right to *ship* machine supplies into Virginia for the purpose of sale, and under the decisions it has a right to *sell* supplies after they have been shipped in, as a necessary incident and consequence of the right to ship. Hence the sale of supplies in Virginia, after they have been shipped there for the purpose of sale, is authorized and justified under the same decisions which authorize and justify the sale in Virginia of *machines* which have been shipped into Virginia for the purpose of sale. In fact, this is exactly what was done in, for instance, the case of *Aultman* v. *Holder*, 68 Fed., 467.

Second. The sale of paper and ribbons and doing repair work are merely *incidental* to the main business, which is the sale of machines. The right to carry on the *main* business carries with it the right to carry on the *incidental* business in aid and furtherance of the main business. This court has recognized this in a number of cases.

In *Crutcher v. Kentucky*, 141 U. S., 59, this court, in holding that an express company was doing an interstate business, the italics being ours, said:

> "We do not think that the difficulty is at all obviated by the fact that the express company, *as incidental to its main business*, which is to carry goods between different states, does also some local business by carrying goods from one point to another within the state of Kentucky. This is, probably, quite as much for the accommodation of the people of the state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions of the company's carrying on the business of interstate commerce which was manifestly the *principal* object of its organization."

In *Kehrer* v. *Stewart*, 197 U. S., 66, involving a tax "upon all agents of packing houses doing business in this state,"

instead of being directed solely against foreign corporations, this court, referring to the above case, the italics being those of the court, said:

> "The case is readily distinguishable from that of *Crutcher* v. *Kentucky*, 141 U. S., 47, wherein a state law requiring a license from agencies of foreign express companies was held to be a regulation of interstate commerce, so far as applied to a corporation of another state engaged in interstate business, although as *incidental* thereto it did some local business by carrying goods from one point to another in the state of Kentucky."

The above case was dealing with a tax imposed by the State on the *agencies*, an *occupational* tax laid on *all* engaged in the *particular* line of business, as a tax on all lawyers, doctors, brokers and others—a wholly different situation from the one now under consideration—but both of the above cases by this court, to cite no others, recognize the right of a foreign corporation to do certain acts or make certain sales which a State will not have cause to complain of, because they are merely *incidental* to the main *interstate* business carried on by it.

Besides, all these things were *necessary* to carry on the interstate business of selling machines—some of the means, instrumentalities and ingredients required to carry it on. Mr. Grubbs says that machines like complicated adding machines *can not be sold* without an agreement to keep them in repair. Nobody would buy them. The agreement to keep the machines in working order, by repairing them when a spring is broken, cleaning them when dirty, or their operation impaired by the loosening of a screw or other parts, supplying a ribbon or roll of paper, and such like matters, was a *necessary part* of the interstate transaction, "absolutely necessary," as Mr. Grubbs says, to sell the machines. To penalize the repairing of the machines, or the furnishing of them with necessary supplies, as paper and ribbons, would

be to either prevent the making of interstate sales altogether, or to hinder, handicap, impede and impose burdens on the free exercise of the right to sell machines in interstate commerce.

VI.

Some other minor matters.

With the affidavit of Mr. Wilson in the injunction suit and used here there was exhibited a card given him by the salesman or solicitor Grubbs, in which he describes himself as "Virginia Sales Manager" (Rec. 70). Even if these words could be regarded as of importance, which we deny, yet we submit that it makes no difference to the issues of this case *how* the salesman Grubbs chose to represent himself on his business calling cards. The facts are shown as to exactly how the business *was carried on*, and they, of course, must govern. Nothing, however, is more common than for "drummers" and salesmen to print the name of the firm or company that they represent on their business calling cards and to represent themselves as occupying a certain relation to the firm or company. This serves to introduce them to parties on whom they call, but it does not change the *character* of their relation or of the *business* which they are carrying on.

With Mr. Wilson's affidavit there was also exhibited a copy of a contract with the telephone company, in which the salesman Grubbs signed the name of the company by himself as the Virginia Sales Manager (Rec. 70). This, like the calling cards, is of no consequence as it cannot change the *character* of the business which the defendant was carrying on in Virginia. It was a contract that Mr. Grubbs made, without the knowledge or authority of the defendant, and was merely his own act, as shown in the proofs.

There is also an affidavit of one Lawder in reference to the imposition of a tax assessed against the defendant at the office of the salesman Grubbs, which the affidavit says was paid by the defendant (Rec. 72). The answer, and the proofs on behalf of the defendant, repeatedly state that the machines which Grubbs had at his office or in his possession were the property of the defendant. This being the case, the state had a right to impose the usual local or *ad valorem* tax on them, as has been held in many cases, beginning with *Woodruff* v. *Parham*, 8 Wall., 123, and repeated in *Brown* v. *Houston*, 114 U. S., 622, and repeatedly recognized by this court in subsequent cases. If the tangible property of the defendant, after the interstate shipment has ended and the property has come to its destination or place of rest, is subject to the usual local or *ad valorem* tax imposed on like property of others, and as to this there can be no question, we do not see how the payment of such tax by the defendant can have any significance or refute its claim that it is engaged in interstate business. No question is raised in this case as to the right of the State to impose and collect the usual *ad valorem* tax on the tangible property of the defendant in the State of Virginia. Consequently, the payment of such tax is of no significance or consequence, so far as the issues of this case are concerned.

The Evidence in This Case.

In the former injunction suit filed by the defendant against the State Corporation Commission, Etc., in the District Court of the United States for the Eastern District of Virginia (213 Fed., 889, and 236 U. S., 699), various affidavits were filed, and these affidavits were admitted by stipulation into the present proceeding by the State against the defendant (Record 55). Among these were the affidavits of Mr. Grubbs, the salesman or solicitor; Mr. Dalton, the president of the defendant company; Mr. Prentis, chairman of the Commission; Mr. Wilson,

clerk of the Commission, and others. These affidavits begin at page 56 of the Record, and detail the defendant's method of soliciting and effecting sales of machines, etc., in Virginia. Mr. Grubbs, the solicitor or salesman, was called as a witness and examined by the Assistant Attorney General of Virginia, beginning at page 17. Copies of the orders or proposals for the purchase or rental of machines, the leases by Mr. Grubbs for his office, and matters of that kind, were introduced and copied into the record during the direct examination. As the cross-examination of Mr. Grubbs states in abbreviated form the defendant's methods, we shall, for the convenience of the court, copy from it *in extenso*, beginning at page 42 of the Record.

"By Mr. Bloomberg: Q. These are the only two leases under which you have rented offices?

"A. Yes.

"Q. Please state who paid the rent under this lease.

"A. I did.

"Q. And you have paid it always?

"A. Always.

"Q. And all expenses in connection with the office?

"A. Yes, sir.

"Q. Who is the owner of the furniture in the office?

"A. I am.

"Q. Have you paid taxes on that regularly?

"A. Yes, sir.

"Q. And the only property of the company in your office consists of sample machines and supplies?

"A. Yes, and the reports; stationery and reports.

"Q. You have made two affidavits previously about the matters involved in this case; state whether or not you have read them recently.

"A. I have.

"Q. State whether you can adopt the facts and statements contained in those affidavits as your testimony today.

"A. Yes.

"Q. Have you read the affidavits made by Mr. Dalton, previously referred to?

"A. Yes.

"Q. Will you please state whether the facts stated in them apply equally as well today?

"A. Yes.

"MR. GARNETT: So far as they were made on the information of Mr. Dalton he cannot state whether they are true or not. So far as his personal information goes, he can state they are true.

"THE CHAIRMAN: Well, let it go.

"BY MR. BLOOMBERG: Q. Have you read the answer in this case?

"A. Yes.

"Q. Are the statements therein true statements of the methods pursued by the company in doing business in this State?

"A. They are, yes.

"Q. If an order is solicited by a sub-salesman of yours, what is the course of that order?

"A. That order comes to my office and I send it to the office of the Dalton Adding Machine Company in the usual way, through the mails, and if that order is accepted, when the machine is paid for I credit commissions to the salesman in accordance with whatever arrangements we may have.

"Q. In other words, every order through a sub-salesman goes through your office?

"A. Through my office.

"Q. Every order from the territory goes through your office, does it?

"A. Through my office, yes.

"Q. Does the defendant keep a bank account in Virginia?

"A. No.

"Q. Does it have any other property in the State besides the sample machines and supplies you have spoken of?

"A. No.

"Q. Does the company as such keep any office is this State?

"A. No.

"Q. Has there been at any time a meeting of the stockholders or directors or officers of the company in this State?

"A. No, sir.

"Q. Coming now to the question of ribbons and papers sold by you, will you please state the total gross

amount of sales from the time you began doing business in February, 1912, up to April 1st, 1915?

"A. The gross sales of ribbons—I will say I think that covers ribbons and paper—are $513.90 from February 1st, 1912, to April 1st, 1915.

"Q. What is the gross amount of sales of machines for the same period?

"A. $65,204.40.

"Q. What part of the ribbons and papers sold were sold for cash received in the city, and what part were billed from Ohio; can you give an estimate of that?

"A. I will say that I believe all of it was billed. In some cases receipted invoices were mailed where the cash was sent in. In other cases the invoices were sent out in the usual way where the cash had not been sent in; but in every instance I believe that the supplies have been billed from the home office.

"Q. Will you show us a roll of this paper?

"Witness exhibits a roll of paper.

"Q. That is the paper referred to in your testimony all the way through, is it?

"A. Yes, sir.

"Q. And the ribbon?

"Witness exhibits a ribbon.

"Q. The rolls of paper are similar to this, and the ribbons are such as you have in your hand, and those are the supplies which the company keeps in Virginia?

"Q. Now of the thirty machines which you said were placed through Virginia on trial, please state how they came into the State, whether they came from your office, or whether they were shipped in a great many instances direct from the company's office to the prospective buyer?

"A. Those shipped to Richmond for trial were shipped to my office; those shipped outside of Richmond for trial were shipped direct to the office of the man trying them.

"Q. So a machine shipped to Roanoke, Petersburg, Lynchburg, anywhere outside of Richmond, to be placed in the office of a prospective purchaser for trial, is shipped directly from the home office of the company?

"A. Except as in such instances as a salesman might be in that locality and the machine might be shipped to him at the express office so that he could examine it and see if there was any damage to it before it was placed in the prospective purchaser's office.

"Q. In how many cases, of the thirty machines mentioned, were they shipped from outside of the State, from the home office of the company to the prospective purchaser?

"A. Well, I am not able to answer that question accurately, but I will say possibly two-thirds of them were shipped directly to the prospective purchaser.

"Q. From the home office of the company?

"A. Yes, sir, from the home office of the company.

"THE CHAIRMAN: And the others were shipped through you?

"WITNESS: The others were shipped to my office, where I take them out of my office.

"BY MR. BLOOMBERG: Q. And those placed by you, I understand, were placed in the City of Richmond?

"A. Yes.

"COMMISSIONER RHEA: Right there; do I understand that they shipped the machines to you, that they are not sold before they are shipped to you, but are shipped to you for the purpose of demonstrating them to people who might want to buy them?

"WITNESS: That is right, yes, sir.

"BY MR. BLOOMBERG: Q. Now, concerning the repairs. Can you give us any idea of the percentage of receipts from repairs as compared with the cost of making such repairs?

"A. Well, in view of the fact that no charge is made for repairing any of the machines for the first two years, on account of the machines having been guaranteed for two years, the receipts as a result of repairs would amount to certainly less than five per cent. of the amount of the actual expenses of making the repairs.

"Q. By the expense, you mean expense to the company?

"A. The expense to the company.

"Q. In other words, on every dollar of repairs made, there is a loss of approximately 95 cents?

"A. Certainly that much.

"Q. What is the reason for making these repairs and entering into these contracts?

"A. Well, a prospective purchaser in no instance would buy a machine constructed of the complicated mechanism that an adding machine is constructed of, unless he were assured of the fact that in case the machine

got out of order it would be promptly repaired. If we did not agree to keep the machine in repair, we would be unable to sell it.

"Q. You have found, then, from experience in this business, that an arrangement for making repairs is absolutely essential to conduct the business?

"A. It is absolutely necessary, yes, sir.

"Q. Mr. Grubbs, in receiving a proposal for the purchase of a machine which has been left on trial at the office of the prospective purchaser, I understand you to say that in each case the proposal or order to buy that machine is signed, and it is forwarded to the company by you?

"A. Yes, sir.

"Q. Has that been the case in every instance?

"A. Yes, sir.

"Q. And there has been no exception to it whatever?

"A. No, sir.

"Q. You have absolutely no authority to transfer title or sell the machine, or make absolute disposition of any property belonging to the company, have you?

"A. No, sir.

"Q. And this applies likewise to machines that you have taken in exchange, as well as new machines manufactured by the Dalton Adding Machine Company?

"A. Yes, sir, to any of the Dalton Adding Machine Company's property.

"Q. And in cases where there may be justification for a larger allowance for a traded-in machine than is set forth in the tariff or schedule published by the Dalton Adding Machine Company, you take up with the company the reasons for this increased allowance, and upon your recommendation the company either accepts or rejects the larger allowance, is that true?

"A. Yes.

"Q. Have you any authority to fix a definite amount for that where it is excess of the scheduled value?

"A. I have no authority to fix any price or terms for a traded-in machine, I simply refer them to the company.

"Q. And even where the traded-in value is in accordance with the schedule submitted you by the Dalton Adding Machine Company, you have no right to close it on that basis, but must submit it to the company for their approval?

"A. Yes, sir.

"COMMISSIONER RHEA: But really you change the terms of that schedule; they go on your recommendations?

"WITNESS: In some cases they do and in some they do not.

"BY MR. BLOOMBERG: Q. In reference to putting machines out on trial do you find that essential to the conduct of the business?

"A. It is absolutely essential, for the reason that the average prospective purchaser of an adding machine has very little idea of how much use he can make of that machine, or how much time it will save him, and you have got to convince him that it will save him time to sell them, and the only way you can convince him is to get him to try it.

"Q. How long have the Dalton adding machines been sold in Virginia?

"A. Since February, 1912.

"Q. Were they known in the State prior to that time?

"A. They were, so far as my knowledge goes, absolutely unknown.

"Q. Therefore, being an unknown machine to the people of this State, it was essential for those machines to be put on trial or test, was it?

"A. Absolutely essential; much more so than it would have been if the machines had been sold here previously.

"Q. You would not have been able to get orders or proposals to buy machines unless you were in a position to have them exhibited to and tried by prospective purchasers, would you?

"A. No, sir.

"Q. Does not the same situation exist today?

"A. It does exist, possibly not to the same extent as previously, but the fact still exists that we have to convince the prospective purchaser that the machine will save him time and eliminate errors in his accounting work in order to be able to sell him, and that condition I think will always exist.

"Q. And the only way you can do that is by putting the machine in his office for a trial or test?

"A. Yes, sir.

"Q. I also understood that in every case where a machine was bought, or there was a proposal to buy a machine signed by a person outside of Richmond, the machine is shipped into the State from the principal office?

"A. Well, I would not say in every case, but in the majority of cases.

"Q. And in the other cases, the machine has already been put there on trial?

"A. Yes, sir.

"Q. Now, who pays the taxes on property located in this State belonging either to you or to the Dalton Adding Machine Company?

"A. I pay an *ad valorem* tax on the sample machines I have in my office.

"Q. Do you pay taxes also on your personal property?

"A. On my personal property, the furniture and fixtures in my office. I pay also a manufacturer's license, state and city."

From the above testimony, as well as from other proofs in the record, it is established that one of the usual, *essential* and indeed indispensible methods required in selling adding an calculating machines is to *place the same on trial* with prospective purchasers to allow them to demonstrate and test the machines to determine whether they are adapted to the special requirements of their particular business, whether they are accurate and reliable, whether they will effect a saving in arithmatical computations or calculations, and things of that kind. Such testing or trying of the machines becomes, therefore, *one of the ingredients, instrumentalities, and essential incidents* to the conduct of interstate business in *such* machines. To prevent such testing or trying would interfere with and prevent the conduct of interstate business in machines which can only be sold after such practical test and demonstration.

As an instance showing the necessity of this testing or trying of machines before renting or buying them, we need only refer to the fact that when one of the public departments of the Commonwealth of Virginia decided to buy a Dalton adding machine the superintendent of such department required

that it be left in his department for demonstration and test. Mr. Bottom, the superintendent of public printing of Virginia, whose department got one of the defendant's machines, at page 52 of the Record, said:

> "We found it desirable to have an adding machine, and I took the matter up with the representatives of the Dalton Adding Machine Company and of the Burroughs Adding Machine. I had the machine *put in my office for demonstration,* and then, not being in a position to purchase the machine, I took up the question of hiring a machine until I could get from the legislature, or ascertain how I might buy one. The Dalton Adding Machine representatives got on the ground first and put in their machine first, and I rented the machine on their contract with the privilege of purchasing the machine, and, if it was purchased, that the rental paid on it would be deducted from the purchase price of the machine, subject to those conditions as set forth in the contract."

On page 54, Mr. Bottom says that in each instance he signed a contract—one for the rental and one for the purchase of the machine. The purchase contract is copied on page 53 of the Record, is addressed to the defendant company, begins by saying, "Please enter my order" for a machine (describing it), specifies that the machine is to be guaranteed for a period of two years, provides that all checks in payment are to be drawn to the order of the defendant company, and provides that the order shall be "subject to approval of the Dalton Adding Machine Company at its office in Poplar Bluff, Missouri." Mr. Bottom tested and tried the machine to the satisfaction of his department, and in pursuance of his order the department of public printing purchased and retained the particular machine that it had required to be put into the office for demonstration and test. And this machine, so rented and purchased by the Department of Public Printing of the State of Virginia, is one of the machines on account of which the State of Virginia has imposed a fine on the defendant!

If it be said that the defendant, after placing a machine on trial with a prospective purchaser and allowing him to demonstrate its capacity and desirability until satisfied so that he desires to purchase the machine, must then, in order to escape the penalties of the Virginia laws, go to the trouble and expense of removing *that* machine and shipping to such purchaser *another and identical* machine from its home office in Missouri or Ohio, instead of allowing such purchaser to retain the machine which he has already demonstrated and tested, and that the State of Virginia can, by its interpretation and administration of the law, *require* this circumlocution as the *only means* of escaping the penalties of its laws, it will immediately become evident that such laws are imposing hindrances, annoyances, expenses, delays, and obstacles to the free and unobstructed doing by the defendant of its interstate business, which this court has repeatedly said must not be. Not only is such a requirement a useless and foolish proceeding, but it is imposing expenses and burdens upon the defendant which the Commerce Clause of the Constitution was intended to prevent, so as to insure full, free and unobstructed interstate commerce.

VII.

A Detailed Consideration of the Decision of the Supreme Court of Appeals of Virginia.

We have already discussed on their merits the sales or rentals of machines already in Virginia, the sales of paper and ribbons, and the repairing of machines in Virginia for the convenience of users and as an incident or adjunct of its main business of selling machines, and need not enlarge on these matters, but will consider briefly some of the statements of the opinions of the Corporation Commission and of the Supreme Court of Appeals of Virginia.

The Supreme Court of Appeals adopted the opinion of the Corporation Commission *verbatim* and quoted it at length as and for its own opinion. At page 89 of the Record the court said:

> "The opinion of the Chairman of the State Corporation Commission, which is a part of the record, appears to us to correctly and satisfactorily dispose of this controversy, and is hereby adopted as the opinion of this court."

Our quotations and comments, therefore, will necessarily and equally apply to both opinions or decisions unless otherwise stated.

At page 82 of the Record, in their decision, the Commission and Supreme Court of Appeals say:

> "A number of quotations from decisions are made to the effect that interstate commerce consists of transactions between 'citizens of different States,' and great emphasis is laid upon this precise language. We think, however, that the decisions do not justify this emphasis, and that no case can be found in which the character of the commerce is made to depend upon the citizenship of the parties or the place of final ratification of the contract. The true test is, not the citizenship of the parties, but the essential character of the transaction. In this case counsel seem to be conscious of this doctrine, and so has introduced a new term, and called the transaction an 'inter-state contract,' apparently concluding that if the contract be 'inter-state' the commerce is inter-state. In this connection, he says: 'This distinguishes this case from all the other cases that we have been able to find in the Supreme and Circuit Courts, and serves, as we think, to stamp the transactions of the defendant with the characteristics and indicia of interstate business, protected by the Commerce Clause of the Constitution.'
>
> "This is the gist of the contention here, and the defendant's case depends upon the ability to establish this proposition."

The citizenship of the parties to the transaction, as dealing from different States, is *one*, but only one, of the essential

ingredients of interstate commerce. An equally essential ingredient is the *shipment* or transportation of the goods which form the subject of the transaction from one State to another. Where there is a conjunction of these ingredients there is interstate commerce. This is repeated and emphasized over and over again in the decisions of this court, from which we have quoted. For instance, in *Veazie* v. *Moore*, 14 How., 573, this court said that commerce with foreign nations signifies commerce which involves "transactions which either immediately or *at some stage of their progress* must be extra-territorial"; and in *Groves* v. *Slaughter*, 15 Peter, 511, this court said that commerce among the states is "dealing in articles of commerce between states, by its *citizens* or others, and carried on in *more* than *one* state"; and in *Welton* v. *Missouri*, 91 U. S., 280, this court said that commerce comprehends intercourse for the purposes of trade and includes "exchange of commodities between the *citizens* of other countries and between the *citizens* of different states"; and in *Hopkins* v. *United States*, 171 U. S., 597, this court said that interstate commerce comprehends "intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between *citizens* of different states"; and in *Globe Elevator Co.* v. *Adams*, 141 Fed., 882, Judge Sanborn, of Wisconsin, said that "interstate commerce comprehends intercourse for the purpose of trade, including transportation, purchase, sale and exchange of commodities between *citizens* of different states"; and *In re Charge to Grand Jury*, 151 Fed., 838, Judge Spear, of Georgia, said that "If any commercial transaction reaches an *eitirety* in two or more states, and if the *parties* dealing with reference to that transaction *dealt* from different states, then the *whole* transaction is a part of interstate commerce of the United States"; and in *United States* v. *Swift*, 122 Fed., 533, where the agent sold meats shipped into the state for sale, Judge Grosscup said that "The transaction in such a case in reality is between the

purchaser and the agent's principal," and that "The transaction, as a commercial entity, includes the *principal,* and includes him as dealing from *his* place of business"; and in *Swift* v. *United States,* 196 U. S., 396, this court said that "When cattle are sent for sale from a place in *one* state, with the expectation that they will end their transit, after purchase, in *another,* and when in effect they do so, with only the interruption necessary to find a purchaser at the Stock Yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a *part* and *incident* of such commerce"; and in *United States* v. *Tucker,* 188 Fed., 743, Judge Sater, of Ohio, said that "A sale, the parties to which are from different States, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce, whether the contract of sale be made in the one state or the other, or made *before* or *after* shipment"; not to quote from scores of other cases in this court, and in the Circuit and State Courts, where language of similar purport is used.

There can be no question that the courts universally lay stress and emphasis upon the fact that the *parties* dealing with each other in reference to goods or commodities *shipped* from one State to another for the purpose of sale are dealing as residents or citizens of different States. The contract between them is an inter state contract—a contract involving citizens of different States. There is nothing new in our contention; the doctrine is old in the decisions of this court and others in so many cases that it would be impractical and useless to enumerate them.

In view of the above decisions, and others of like purport that could be cited, we think we are right in emphasizing the significance of the fact that the transactions involved in this

case are between "citizens of different States," inasmuch as in all of the transactions there was a *shipment* of the subjects of the transactions into Virginia from other States. The one ingredient of interstate commerce—the shipment—is not questioned, and there only remains to be seen whether the other ingredient of interstate commerce—the dealing between citizens of different States—exists to entitle the defendant to the protection of the Interstate Commerce Clause of the Constitution.

The sole question in this case, therefore, resolves itself into an inquiry as to whether the shipment *may* be before the contract of sale, or *must* be subsequent to the contract of sale. If the shipment *may* precede the sale, then in this case the Commission and the Supreme Court of Appeals were wrong in their decisions respecting the sale or rental of machines already in Virginia; but if the shipment must in all cases *succeed* the sale, then the defendant can have no protection as to such machines. This, as we conceive, is really the sole question in the case, so far as the sale and rental of the defendant's machines held to be contrary to the statutes of Virginia are concerned. As to our contention that the shipment may *precede* the sale, we refer to the various decisions cited under our first and second numbered propositions; and as to our contention that the sales were not made *in* Virginia, but in *Missouri* or Ohio, where the orders or proposals were considered and acted upon, thus consummating the sale and constituting it an interstate transaction between *principals* dealing from *different* States, we refer to the decisions cited under our fourth numbered proposition.

The Commission and the Court of Appeals in their decisions, at page 83, also say:

> "If it be true that because, at some stage of a commercial transaction, it is necessary to have the approval of the seller, who is a citizen of a different State and lo-

> cated in that other State at the time the contract is said to be completed, therefore, the transaction is interstate commerce, then a discovery has been made and a new and large class of commercial transactions, which are in essential character intra-state commerce, will be protected by the Commerce Clause of the Constitution."

We disclaim any such discovery as the Commission and the Court of Appeals seem to think has been made, as the decisions of this court have repeatedly announced the doctrine which the Commission and the Court of Appeals seem to consider novel. If it be a "discovery" it is simply a discovery by them of the meaning of the law. Furthermore, they are in error in saying that such transactions "are in essential character intra-state commerce," inasmuch as they are just the opposite—*inter*state commerce.

We now come to a statement by the Commission and the Supreme Court of Appeals in their discussion, which we think is wholly gratuitous and without foundation in the record in this case. It is a statement imputing improper motives to the defendant in the adoption of its method of doing business. The Commission, at page 83 of the Record, say:

> "That this method of transacting business by The Dalton Adding Machine Company is a mere device for the purpose of avoiding the State statutes is apparent, when the contention is made that, even in case of a cash transaction, when a machine, previously in the possession of the purchaser, is sold by a local agent to that purchaser for cash, strictly in accordance with the previous instructions given to the local agent, such a transaction needs confirmation by the company at its Home Office. The price is fixed, the property delivered, the terms complied with, and nothing is left of such a transaction except for the local agent to send the check or the currency to the selling company. Inasmuch as the purchaser has complied with every substantial term of the contract, it is not believed that the selling company could refuse to accept the purchase price, notwithstanding the device referred to. It can only be resorted to in case of such a cash

> transaction for the purpose of attempting to convert 'into a form resembling interstate commerce that which in its intrinsic substance is local business subject to State control.' A similar effort has been vainly essayed and condemned by the Supreme Court of the United States. *Waycross* v. *Georgia,* 233 U. S., 16, 58 L. Ed., 828."

The Supreme Court of Appeals, in the introduction to their opinion, before adopting and quoting the decision of the Commission, at page 88 of the Record, also say:

> "The first impression obtained from reading the record is that the company's purpose has been to avoid, not to say evade, the license tax provided for by section 1104 of the Code; and, upon a more mature consideration, this impression becomes a conviction that the method of transacting a substantial part of the business in question is, as found by the Corporation Commission, 'a mere device for the purpose of avoiding the State statutes.' "

The above statements, that the defendant's method of selling its machines in Virginia "is a mere device for the purpose of avoiding the State statutes," are, as we have already said, without justification from anything in the record, as we believe. The testimony shows that the defendant has for many years employed exactly the same method of carrying on its business in all the States and long before it began to seek business in Virginia. Mr. Grubbs, on page 43 of the Record, testifies that the methods of doing business, set out in the answer which begins at p. 5 of the Record, and in the affidavits of himself, beginning at p. 56, and in the affidavit of Mr. Dalton, the president of the company, beginning at page 59, are correctly set forth and explained. The characteristic feature of such method is and for many years has been to require a prospective purchaser to sign a written proposal to buy or rent a machine, which written proposal had to be transmitted to the company at its home office in Missouri or Ohio for approval or rejection, and which proposal never ripened into a contract of sale until it had been approved by the company at

its home office. Until such approval it was simply a proposition or proposal and nothing more. In no other way can the defendant control and regulate its business, extending all over the country. It must maintain a *check* on the actions of solicitors and salesmen. It must be the *judge* as to whether it desires to sell or will sell a machine to any particular person or company desiring to buy. It must *reserve* the right to approve or reject a sale, whether upon time, involving the giving of credit, or for cash, involving other considerations, as we will point out. And this is equally true where a party desires and proposes to rent a machine.

It has the right and it is in accordance with sound business principles to determine to *whom* it will and will not sell a machine even for cash, where the price in full accompanies the proposal of the purchaser to buy. There is sound business reason for the reservation by the defendant of a right to reject a proposal to purchase even when the full price is tendered. Yet the Commission and the Court of Appeals cite the instance of a cash transaction as evidence of a purpose and intention on the part of the defendant to evade the statute. The reservation of the right to reject a proposal to buy a machine for cash, giving the defendant time for investigation, might enable the defendant to ascertain that the purchaser desired the machine for an improper purpose, as, for example, to imitate and infringe it, or for use in a way contrary to the interests of the defendant, and particularly to its guaranty to keep the machine in repair for a given period. It might turn out on investigation that the proposing purchaser for cash desired to buy the machine to shop it to a *foreign* country, or into remote territory, where the defendant had no representative and where it would be impracticable and even impossible for the defendant to carry out its guaranty to repair the machine and keep it in order, thus putting the defendant to intolerable expense or discrediting it as not living up to the guaranty to

keep the machine in repair, which guaranty accompanies every sale. It might also turn out on the investigation, which can be made where the right to reject a cash offer as well as a time payment offer is reserved, that the proposing purchaser for cash represented some one *indebted* to the defendant for previous machines where the defendant was unable to collect and had refused to again accommodate such party. These are all good, sound and valid reasons why the defendant should maintain and insist upon its right to consider and accept or reject a proposal accompanied by the cash as well as in other cases. Indeed, the testimony of Mr. Grubbs, at page 30, says that he has known of the defendant refusing to sell machines for cash where offered the full price, and he states some of the reasons.

The Commission and the Supreme Court of Appeals say that where the purchaser "has complied with every substantial term of the contract it is not believed that the selling company could refuse to accept the purchase price." This is a strange utterance when used in reference to a private corporation that has no quasi public duties, such as imposed on common carriers, for instance, and which is at liberty to accept or reject any proposal to buy or rent a machine whether with or without reason. But the statement overlooks the fact that one of the "substantial terms of the contract" is that the defendant expressly *reserves*, and is given by the very terms of the proposal to purchase, the *right* to approve or to reject the proposed offer to buy. There can, therefore, be no compliance with "every substantial term of the contract" until *this* term, among others, has met the approval of the defendant. Both parties to the contract *agree* to this provision.

Furthermore, it is not for the Commission or the Supreme Court of Appeals to pass upon the good sense, business judgment and established manner in which the defendant prefers to conduct its business. It is for the defendant to determine

how it will carry on its business so long as it keeps within the law. The *motives* that determine a merchant, manufacturer, or dealer in the conduct of his business are outside the right or function of the Commission or the Court of Appeals to predicate a judgment or decision upon. To cite a single case would seem to be superfluous, but, nevertheless, we will quote from a decision of this court which we think is in point.

In *Kirmier* v. *Kansas,* 236 U. S., 568, it appears that Kirmier, for the express purpose of avoiding the prohibition laws of Kansas, removed his place of business across the river to Stillings, Missouri, a little village containing but a few residences. Here he maintained a warehouse and barn, although he continued to reside in Kansas. When he received orders for beer from citizens of Kansas residing across the river in Leavenworth, he filled such orders by sending the beer in wagons across the river and delivered the same at the houses of his customers. The Supreme Court of Kansas held that this was a mere trick or device to avoid the laws of the State, and, as quoted at page 569, the State Supreme Court said:

> "The broad question here is whether the defendant was really engaged in commerce between the States of Missouri and Kansas, or was he only seeking *by tricks and devices* to avoid the laws of his State—doing by indirection that which could not lawfully be done by ordinary and direct methods."

The State Supreme Court, in discussing the defendant's business, said:

> "He may not under the guise of moving across the State line, and other shifts and devices to evade the Statutes of the State, continue in the prohibited business here and be immune from the penalties of our law."

This court, however, after citing many cases, held that the defendants' business was interstate, and that "the traffic

moved by horse-drawn wagons from a point near the State line, instead of by railroad from a greater distance, does not change the applicable rule." And on page 573, in reversing the decision of the State Court, said:

> "Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been adopted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we can not conclude that a legal domicile in Kansas coupled with a reprehensible past and a *purpose to avoid* the consequences of the Statutes of the State suffice to change the nature of the transactions."

The Georgia case, *Waycross* v. *Georgia*, 233 U. S., 16, cited by the Commission and the Supreme Court of Appeals in the quotation from their decisions, does not deal in any manner with the *method of doing business* employed by the defendant, namely, the requirement that before a sale or rental is effected the offer or proposal to purchase or rent *must be transmitted to the defendant in its own State for consideration, acceptance or rejection*, irrespective of whether the purchase was on time or for a cash payment. In the Georgia case, the defendant was engaged not only in shipping lightning rods to Georgia, but also in the business of erecting them on the houses where they were to be located. The State Court held that this branch of the business was a local business, and this court, at page 22, said:

> "We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed was within the regulating power of the state and not the subject of interstate commerce, for the following reasons: (*a*) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority. (*b*) Because, besides, such business was wholly separate from interstate commerce, involving no question of the delivery of prop-

> erty shipped in interstate commerce or of the right to *complete* an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated."

The Commission and the Supreme Court of Appeals, in their decisions in considering the contracts by which the defendant effects its sales of machines, say:

> "That contracts for such sales as we are now considering are Virginia contracts is plainly demonstrated by the fact that the contract is negotiated between an agent of the seller in Virginia, and a purchaser in Virginia, for the sale of a machine which is in Virginia, the terms of sale being completed and the contract fully performed in this state. *London Assurance* v. *Campania De Moagens de Narreiro,* 167 U. S., 161; 42 L. Ed. 120."

A reference to the London Assurance case shows that it involved the question as to whether a contract between an English insurance company and parties in this country was to be governed as to its *performance* by the laws of this country or England. The contract by express terms was to be performed in England. This court, at page 160, said:

> "Under the circumstances we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance."

This case is merely in accordance with the general principle of law that a contract to be performed at a place other than its place of execution is to be controlled as to its validity, nature,

obligation and interpretation by the laws of the place of performance. It in no way passes upon the question as to whether a contract made in one place to be *approved* at another is or becomes a contract *until* approved and at the *place* of approval. No doubt a contract to erect a building or to build a section of railroad in Virginia would be governed as to its *performance* by the laws of Virginia. The question, however, as to whether a proposal to buy a machine in Virginia, which expressly provides that it must receive the approval of a party in another State, is *not* a Virginia contract, is settled by the express ruling of the courts in *Aultman* v. *Holder,* 68 Fed., and this court in *Holder* v. *Aultman,* 169 U. S., and *Loeb* v. *Columbia Township Trustees,* 179 U. S., from which we have already quoted under our Fourth Proposition.

The Commission and the Supreme Court of Appeals, in their decisions, after the quotation above, further say:

> "Here the movement of the machines in interstate commerce had been accomplished. They are at rest in this state, some of them in the possession of the local agent, some in the possession of persons with whom they have been left for trial, and some are held by persons in this state as lessees. They are mingled with the other property of the state and protected by state law. It seems to be admitted that they are subject to the local property tax."

We have no doubt that the machines in Virginia belonging to the defendant are subject to the imposition of a general *ad valorem* tax the same as other property in the State. As already shown, however, by decisions under our Third Proposition, this circumstance exists as to goods protected by the commerce clause of the Constitution. The facts stated by the Commission are good reasons for the contention that the defendant's machines are subject to local taxation in Virginia, a matter not in controversy, but they in no way show that the

machines are not protected as interstate commerce. Nor do they in any way show that the contracts relating to them are Virginia contracts, or that the sale or rental of the machines under contracts such as made by the users with the defendant are not interstate contracts. The decisions, at page 84, then says:

> "The sales of such machines thus in the state, mingled with the other property in the state and subject to local taxation, can not be distinguished from the sales of any other property thus located in the state."

Here again we find the error that appears again and again in the decision of the Commission and the Supreme Court of Appeals, namely, that the right of local *ad valorem* taxation is *determinative* of the character of the business, whether interstate or otherwise. If this were the test, then no interstate business, where the shipment preceded the sale, could exist. It is not the test and is not the law, as the decisions we have quoted fully establish.

The Commission and the Supreme Court of Appeals, at page 85, say:

> "Commercial transactions in this state involving the bargain and sale of specific commodities sold in competition with local dealers may escape all state exactions by the mere device of having the non-resident owner ship them into this state, and say that (even when they are sold for cash) all sales are subject to his approval outside of the state. It seems to us that the mere statement of the results which would follow if this admittedly new doctrine is established would be so revolutionary as to condemn it as unsound."

The Commission and the Court of Appeals are wholly in error in saying that transactions such as those of the defendant "may escape all state exactions," because under numerous decisions the goods or machinery dealt in would be sub-

ject to local *ad valorem* taxation the same as other similar articles or machines in the state. No such "results" would follow as the Commission and Court seem to think.

The Commission and Court cite "as decisive" of the question involved in this case, *Kehrer* v. *Stewart*, 197 U. S., 60, and *Armour Packing Co.* v. *Lacey*, 200 U. S., 226. We regard neither of these cases as either decisive of the question presented here or as parallel in any respect.

In the *Kehrer-Stewart* case, Nelson Morris & Co. of Chicago, whose transactions were involved, "had a place of business in Atlanta, Georgia, where they sold their products at wholesale." The defendant has no place of business in Virginia. They had also "in their employ several clerks and helpers, one of whom was the petitioner, who was employed as chief clerk and manager at a salary of $25 per week." The defendant in this case has nobody in its employ in Virginia on a salary, but simply a solicitor or "drummer," who solicits orders or proposals and transmits them to the defendant at its Home Office—something entirely different from the course of business of Nelson Morris & Co. They also had meats stored in the Atlanta house of the firm, where they "were kept and held for sale, in the *ordinary* course of trade, as domestic business." Not only does the defendant in this case have no house or office in Virginia, but it does not have its machines there to be sold in the "ordinary" course of trade, or over the counter as meats are sold, or as domestic business, but only for sale *after* a proposal is received by them, which is required to be transmitted to the defendant at its Home Office, to become effective only *after* its acceptance there.

In the *Armour-Lacey* case there was involved a law imposing a tax "upon every meat packing house doing business" in North Carolina. It was an *occupational* tax imposed upon

the citizens of the State, as well as others having meat packing houses in North Carolina. This court, at page 236, said:

> "By the act under consideration the tax is levied upon every packing house doing business in the State, which includes by its terms both domestic and foreign meat packing houses."

If the Virginia statute simply imposed a tax on everybody selling adding machines in the State of Virginia, so as to include those which were manufactured and sold there, as well as others, instead of on foreign corporations only, it would present an entirely different question—one parallel to that involved in *Armour* v. *Lacey*—but no such condition exists in this case.

As already repeatedly said, this whole case, so far as the sale of the machines which the Commission and the Supreme Court of Appeals have found were in contravention of the laws of Virginia, is concerned, turns upon the question as to whether the shipment *may* precede the sale or *must* succeed it. The Commission and the Court have held that the shipment *must succeed* the sale. This is the basic error that runs through the entire decision. The Commission and Court hold in effect, and in fact, that because the machines were shipped into Virginia *before* they were sold or rented, the defendant is doing business in Virginia, notwithstanding the sales or rentals are not made *in* Virginia, but only proposals or offers to buy or rent procured by a solicitor or drummer, who has no power or authority to sell or rent a machine, and who has not sold or rented a machine, and where the proposal on its face provides that it must be approved by the defendant at its home office in Missouri or Ohio, and does not become a contract until so approved at the Home Office, whereby a dealing or contract is involved between the proposing purchaser in Virginia and the defendant in Missouri or Ohio, thus constituting a transaction in inter-state commerce.

If this court decides against the defendant as to the sales and rental of machines, as did the Commission and the Supreme Court of Appeals, it must do so upon the ground that the commerce clause of the Constitution does not protect interstate commerce except in those cases where the *shipment* of the goods *follows* the order proposal or contract of sale, and does not extend to those cases where the goods were *first* shipped into the State for the purpose of sale, and afterwards sold, not by an agent *in* the State *authorized* to make such sale, but by a negotiation and dealing *between the two* principals, the purchaser and the seller, each acting from different States. We do not believe that this is the law, or that this court will so hold.

If this court shall conclude, on a review of the whole case, that the Commission and the Supreme Court of Appeals of Virginia, in their interpretation and application of the law, have erroneously abridged or restricted the rights of the defendant as to *any* of the things which it had a right to do, but for which it has been fined, then we take it that this court will direct such modification of the judgment below as will leave the defendant at liberty to do *those* things which the Commerce Clause of the Constitution was intended to protect it in, even though it may be obliged to discontinue the others.

Respectfully submitted,

THOMAS A. BANNING,
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HAROLD S. BLOOMBERG,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1917.

No. 176.

THE DALTON ADDING MACHINE COMPANY, A CORPORATION,

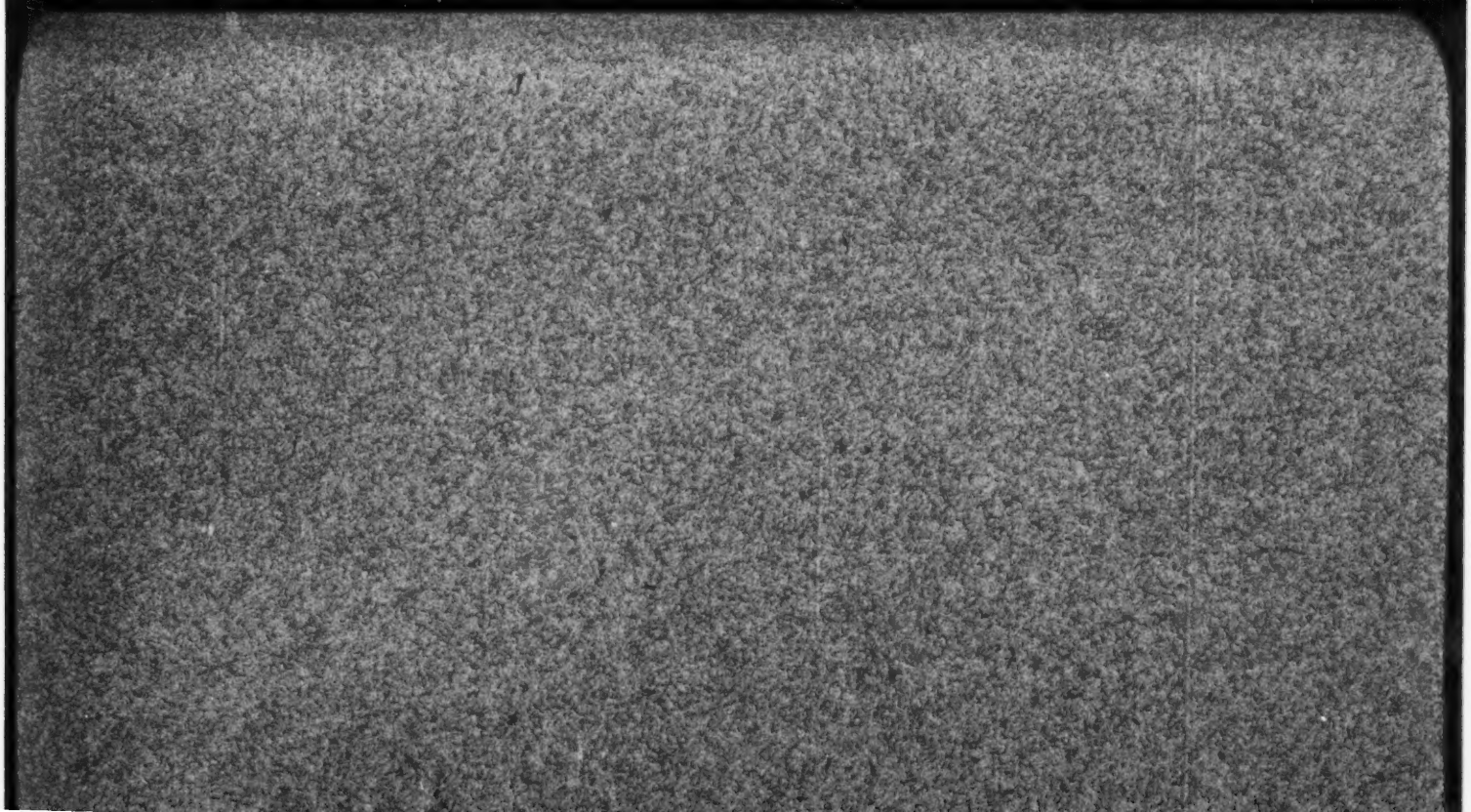
v.

COMMONWEALTH OF VIRGINIA, EX REL STATE CORPORATION COMMISSION.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA.

J. D. HANK, JR.,
Attorney General of Virginia.



SUBJECT INDEX.

CASES REFERRED TO.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA.

HISTORY OF THE CASE.

This case is the sequel to the cause of *Dalton Adding Machine Co.* v. *State Corporation Commission of Virginia*, 236 U. S. 699, 69 L. Ed. 797, and comes here upon a writ of error to the final decision of the Supreme Court of Appeals of Virginia (the Court of last resort of that State) rendered against the Dalton Adding Machine Company, a corporation. This decision of the Supreme Court of Appeals of Virginia, affirmed an order of the State Corporation Commission of Virginia, finding the Dalton Adding Machine Company guilty of transacting business in the State of Virginia, in violation of Sections 1104 and 1105 of the Code of Virginia, and assessing a fine of $1,000.00 for such violation.

Section 1104 of the Code of Virginia, p. 137, Vol. 3, provides:

"Every incorporated company doing business in this State shall have an office in the State, at which all claims

against the company, due residents of the State may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State corporation commission (a) a written power of attorney, executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation, and (c) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said corporation commission a certificate of authority to transact business in the State. If it shall be made to appear to the State Corporation Commission that said corporation has complied with the law relative to the obtaining of a certificate of authority for foreign corporations of the character of the applicant corporation, then said corporation commission shall issue to said corporation a certificate of authority to transact business in the State. Said commission shall file and preserve in their office one copy each of the power of attorney, charter, certificate of the auditor and a certificate of the commission granting such certificate of authority, and forward copies of said documents to the Secretary of the Commonwealth, who shall file and preserve the same in his office. Whenever by reason of his removal from the State or from any other cause the powers of such resident agent shall be terminated, then such foreign corporation shall, by like written power of attorney, executed in duplicate and filed with the corporation commission as above provided, appoint another resident agent; one copy of such power of attorney shall be filed and preserved in the office of the corporation commission, and the other copy thereof transmitted to the Secretary of the Commonwealth to be filed in his office. If the charter of any foreign corporation thus authorized to transact business in this State is amended, two duly authenticated copies of such amendment shall be presented to the corporation commission and filed as copies of the original charter are required to be filed, and the fee required by law on such amendment shall be paid in the manner prescribed by law. Any foreign corporation which has heretofore paid the fee required by law to entitle it to transact business in this State, and has otherwise complied with the law heretofore existing relative there-

to, shall not, on application for certificate of authority to transact business in this State, be required to pay such fee again, nor to file a copy of the charter with the Secretary of the Commonwealth, if a copy thereof is already on file in his office. Such corporation shall pay the clerical fees for such certificate of authority and for filing such papers as prescribed by law."

and Section 1105 of the Code of Virginia, Vol. 3, p. 138, provides:

"If any foreign corporation shall transact business in this State without first obtaining such certificate of authority provided for in the preceding section, it shall be fined not less than ten dollars nor more than one thousand dollars, such fine to be imposed by the State Corporation Commission, whose duty it shall be to see that provisions of the preceding section are complied with. Every transaction had in the State by such a corporation without such certificate of authority shall be deemed a separate offense. The officers, agents and employees of any such corporation doing business in this State without such certificate of authority shall be personally liable to the State for any fines imposed on it, and to any resident of the State having a claim against such corporation, and service of legal process upon any of said officers, agents or employees shall be deemed sufficient service on the corporation.

No such foreign corporation shall recover any money or property or enforce any contract in any court without first obtaining the certificate of authority to do business in this State provided for in the preceding section, nor until all taxes, fees and charges due to the State have been fully paid: provided, that nothing contained in this act shall prevent any corporation, after having withdrawn from the State, from enforcing a contract legally made while said company was acting under a certificate of authority from the State Corporation Commission as provided in this act.

When any such corporation shall desire to cease doing business in this State, it may do so by surrendering to the State Corporation Commission such original certificate of authority, or if it be lost or destroyed, by filing an affidavit to that effect with the State Corporation Commission in lieu of such original certificate of authority, and by paying all taxes, fees and charges then due to the State. Such certificate of authority shall not be construed to authorize any such foreign corporation to exercise any of the powers or

functions of a public service corporation in this State, nor to exempt such foreign corporation from the payment of any State or local revenue license."

There are, of course, similar statutes applying to domestic corporations, but it is unnecessary to set them out, as no question of discrimination is raised in this case, the only question being whether or not the entire business done by the plaintiff-in-error in Virginia is protected by the commerce clause of the Federal Constitution.

STATEMENT OF THE FACTS.

There is no dispute as to the facts, but, as we believe, that a thorough understanding of the facts in this case are essential to a proper determination of its issues, we shall relate them in detail.

The plaintiff-in-error, The Dalton Adding Machine Company, is a corporation which was first chartered under the laws of the State of Missouri, with its principal office at Poplar Bluffs, Missouri, but is now chartered under the laws of Ohio, with its principal office in Cincinnati. It is engaged in the manufacture and sale of adding, listing and calculating machines with the necessary appliances for the use therefor and therewith (R. p. 59) and distributes its machines through its sales agents to its customers (R. pp. 1, 6). Its authorized capital stock is $2,750,000. It has been doing business in the State of Virginia since February, 1912, (R. p. 20) and its business in this State amounts to more than $18,000 per year, its gross sales of machines in the State from February 1, 1912, to April 1, 1915, amounting to $65,204.40 (R. p. 44).

Its entire business in the State of Virginia is conducted by and through a sales agent and its products are sold in that State exclusively through such agent (R. p. 43). This agent has no written contract with the plaintiff-in-error, but simply a verbal contract, which gives him exclusively as "his territory" the State of Virginia, and he is paid a commission on the sales made in that State as a compensation. This sales agent maintains a place of business in Virginia in the City of Richmond, where he em-

ploys a stenographer and an assistant sales agent (R. p. 20) and has a telephone in the name of the plaintiff-in-error at his place of business (R. p. 70).

At this place of business in the City of Richmond, the plaintiff-in-error keeps adding machines, stands for the machines, a small supply of ribbons and papers to be supplied for the machines sold (the ribbons and papers sold with the machines, of course, giving out from time to time), certain other parts of the machines to be used for repairs, reports and stationery (R. pp. 20, 42). The title to these machines, stands, accessories and supplies is in the name of the plaintiff-in-error, and if any of them are lost or injured while in the possession of the sales agent in the State of Virginia, the plaintiff-in-error bears the loss (R. p. 21).

The plaintiff-in-error claims that no sale or conveyance of its property is made, without a *contract or order approved at Cincinnati, Ohio* (R. pp. 21, 30, 33, 34). In order for the title of any of the property kept in Virginia by the plaintiff-in-error to pass, the approval of the plaintiff-in-error at Cincinnati, Ohio, must be secured (R. p. 45).

The plaintiff-in-error formerly sold or rented its machines by the use of four forms, which are set out in full in the record (R. pp. 8, 12), but recently the first two forms have been discontinued and all sales or rentals of said machines are now made entirely by the use of the last two of these forms (R. pp. 10, 11, 12, 25, 32). It will be noted that the first of these two forms is in the nature of a receipt for a machine, which the customer rents from the plaintiff-in-error at a stipulated price per month, the machine to be returned to the plaintiff-in-error at the expiration of the rental period provided in the lease. The other is simply an order acting as a purchase of a machine. The first of these forms will hereinafter be designated as the rental contract and the other as the purchase form.

It will be further noted that, while the rental contract has a provision at its top in the following language:

"Not effective unless approved by the Company" (that is, the plaintiff-in-error), it is provided in the body of the contract as follows (R. p. 10):

"It is further agreed that this instrument shall not become effective unless approved and accepted by the said Dalton Adding Machine Company at Poplar Bluff, Missouri. *Notice of such approval and acceptance is hereby waived.*" (Italics ours).

Special attention is called to the portion of the above quotation, which is italicized, because, although the rental contract purports on its face not to be binding or effective, unless approved by the plaintiff-in-error, the contract further provides that notice of said approval and acceptance is waived by the person who rents the machine.

The purchase form provides on the margin (R. p. 11):

"This Order Subject to Approval of the Dalton Adding Machine Company, at its office in Cincinnati, Ohio,"

and on its back contains this provision (R. p. 12):

"It is expressly agreed that this order shall not be countermanded."

The approval is never indorsed on the contract intended for the purchaser, but only on the copy intended for the plaintiff-in-error, and this indorsement is placed thereon after it reaches Ohio.

While these two forms are the forms generally used by the plaintiff-in-error in conducting its business in Virginia for the sale of its machines, the Company also sells machines to special purchasers such as railroads, municipal officers and certain other corporations upon the purchase forms which the latter corporations uses, with requisitions ordering materials (R. p. 37).

INTERSTATE BUSINESS.

The plaintiff has adopted two methods which it uses to secure sales and rentals of its machines in Virginia, both of which methods are conducted by means of the sales agent of Virginia hereinbefore mentioned, and his various assistants (R. p. 56). The first method used is for the sales agent to leave a machine with a prospective purchaser and if, after trial, such purchaser is satisfied with the same, he signs either the rental contract or the

purchase form (according to whether he desires to rent or purchase) and the paper so signed by him is transmitted by mail to Cincinnati, Ohio, in response to which a machine is shipped direct from the home office to the customer. About two-thirds of the gross sales in Virginia are consummated in this manner (R. p. 44) and, as we will show later, there is no contention on the part of the State of Virginia that this method of doing business is not strictly interstate commerce. For convenience, we will hereafter refer to this method of doing business in Virginia by the plaintiff-in-error as the "*interstate method.*"

INTRA-STATE BUSINESS.

But the plaintiff-in-error uses another method in Virginia to dispose of its machines, and other property located there, and this method is, to a large extent, the cause of this litigation and will, for convenience, be designated by us as the "*intra-state method.*" This method of disposing of the machines of the plaintiff-in-error is as follows: The plaintiff-in-error, without any previous order therefor—or to use the expression often used by this Honorable Court, "without any previous sale or contract to sell"—ships to its sales agent in Virginia, and particularly to him at his headquarters in the City of Richmond, its machines, and these machines are kept and held for sale in the ordinary course of business in Virginia. These machines are shipped to Virginia in advance of procuring orders or proposals to buy the same (R. p. 62) and are put on display and offered for sale at the place of business of the sales agent, 22 N. Seventh Street, Richmond, Virginia, and at other places through the State (R. p. 20). All of these machines so located in Virginia are offered for sale to such customers as may require them, and until sold are kept and displayed for sale, but remain the property of the plaintiff-in-error (R. p. 20). At the time of the beginning of these proceedings, plaintiff-in-error had about thirty machines in the State of Virginia unsold, and which were not sent into this State in response to orders therefor, but were shipped to Virginia in order to sell them to such customers as could be obtained (R. p. 23); it being the expectation of the plaintiff-in-error to sell all such machines in Virginia. *About thirty per cent. of the gross sales*

of the machines shipped to Virginia by the plaintiff-in-error, are made from machines shipped to Virginia and displayed for sale before the purchaser is secured therefor. (R. p. 24).

While, as has been hitherto shown, the plaintiff-in-error retains title to all the machines which it ships to Virginia, for the purpose of offering them for sale after they have arrived in that State, it has a fixed price for the machines so located in Virginia and the sales agent is authorized to offer them for sale at the price so fixed.

If a customer desires a machine, he may go to the place of business of the sales agent in Richmond, Virginia, and inspect the machines, which the plaintiff-in-error has shipped there, and which is held there for sale (R. p. 33) and if he is satisfied with one of these machines, he may pay the sales agent the full price fixed on the same by the plaintiff-in-error, whereupon the sales agent delivers the machine selected to such purchaser and then requires him to sign the order which we have designed as the purchase form, requesting the plaintiff-in-error to enter his order for the identical machine for which he has already paid in full, and which has already been delivered to him, and this order is forwarded to the plaintiff-in-error at Cincinnati, Ohio, for confirmation, and until this order is forwarded, the sale is not considered by the plaintiff-in-error as complete (R. pp. 27, 33).

Generally, however, the machines of the plaintiff-in-error on hand in Virginia are disposed of in this way: The sales agent or one of his assistants, leaves one of such machines with a prospective purchaser for trial. If the purchaser afterwards desires to purchase the machine, he may keep the identical machine left him for trial, signing therefor a purchase form if he desires to buy, or a rental contract if he desires to rent, but in case of purchase in this manner, just as in the case mentioned above, even though he has paid the full purchase price and the machine is already in his possession, an order for that identical machine must be executed by the purchaser, and sent to the plaintiff-in-error for approval to his office in Cincinnati, Ohio, before the title passes (R. pp. 23, 28). If, on the other hand, he prefers not to pay cash or only desires to rent, he still retains the machine left him as aforesaid, and executes what we have designated as the rental

contract, by which he acknowledges receipt of the machine which has been delivered him out of the stock of the plaintiff-in-error located in Virginia, and agrees to pay a certain rental per month for the use of the same, this rental to be applied to the purchase price if the renter desires to buy the machine before said rental period expires.

But the disposal of its machines is not the only business conducted by the plaintiff-in-error in Virginia. It carries on other lines of business which may properly be included in what we have above termed its "intra-state method" of doing business. Ever since the plaintiff-in-error has been doing business in Virginia, it has been entering into contracts to keep in repair for two years all machines sold by it to its Virginia customers, though the time has now been shortened and the plaintiff-in-error only agrees to keep such machines in repair for one year (R. p. 36). After the expiration of the time for which the plaintiff-in-error agrees to keep the machines in repair, in many cases, it enters into what it calls a "machine service contract" with its customer, by which contract it agrees in consideration of $10.00 to inspect, clean, oil, adjust and repair a designated machine as often as is necessary to cause it to render efficient service for one year (R. p. 35). If, however, the time has expired within which the plaintiff-in-error has agreed to keep the machine in repair, and the customer does not desire to enter into a "machine service contract" he still may have any repairs made to his machine he desires by calling on the plaintiff-in-error through its representative. Upon the demand of any customer, even though there is no contract therefor, the plaintiff-in-error will repair his machine and make a reasonable charge for the time spent in making such repairs, the charges being fixed by the plaintiff-in-error upon a written report sent it by the mechanic making the repairs, the bills being made out in the name of the plaintiff-in-error for such repairs and collected from the Virginia customer (R. p. 38). To do all this repair work which the plaintiff-in-error is under contract to do or which is otherwise required of it by its customers, the plaintiff-in-error regularly employs and pays a mechanic in the State of Virginia, whose duty it is as representative of the plaintiff-in-error to make all repairs that the plaintiff-in-error is under

contract to make or which any customer who may have no contract may require (R. p. 36-7).

Nor is this all of the business carried on by the plaintiff-in-error in Virginia. By means of the form, which we have designated as the rental contract, the plaintiff-in-error carries on the business in the State of Virginia of renting its machines already located in Virginia to persons in Virginia and delivering the machines to the renter and collecting the rent for the use thereof, which rents in case the renter subsequenty decides to buy that particular machine, are credited on the purchase price, the Company reserving the right to resume posession of the machine in case of violation of the rental contract or upon its expiration (R. p. 32).

Moreover, the Company keeps on hand at the store in Richmond, supplies consisting of ribbons, papers and parts of the machines suitable for use upon the machines and from time to time supplies its customers with ribbons and papers from the stocks so held in the State of Virginia, and uses the repair parts for repairing machines through it mechanic. The title to all these accessories remain, until sold, in the plaintiff-in-error and such sales are reported by the sales agent to the home office in Ohio, but it is not necessary as in the case of any other sales of the Company's property, that there should be a previous or subsequent approval of the sale of ribbons and paper by the plaintiff-in-error, the agent in Virginia having authority to consummate such sales.

At this place of business are also kept extra stands upon which the machines rest, and in case these extra stands are sold, even though for cash, there must be an approval of the sale by the plaintiff-in-error in Ohio before the title passes thereof, and the sales agent at the time of the payment of the purchase price of such stand to the purchaser (R. p. 30).

Again, in making sales, the plaintiff-in-error receives machines made by other manufacturers in exchange for its machines and as part of the purchase price thereof, which machines so received in exchange are kept by the plaintiff-in-error in Virginia and sold by it to whomsoever it can. (R. p. 34).

THE ISSUE IN THIS CASE.

The effect of the statute in question is to affix certain conditions to the privileges granted foreign corporations to do business in Virginia. The requirements of the statute in question are conditions precedent to the right of the foreign corporation to do business in that State.

It must be regarded as finally settled, by frequent decisions of this court that a State may impose such conditions upon permitting a foreign corporation to do business within its limits, as it may deem expedient. Only two exceptions or qualifications have ever been attached to this doctrine in all the numerous adjudications in which the subject has been considered. One of these qualifications is that a State court cannot exclude from its limits a corporation in the employ of the Federal government. The other qualification is that the State cannot exclude from its limits a corporation engaged in foreign or interstate commerce.

Paul v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357 (1868).

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 36 L. Ed. 164 (1892).

New York v. *Roberts*, 171 U. S. 658, 43 L. Ed. 324 (1898).

Pembina Con. Etc. Co. v. *Pa.*, 125 U. S. 181, 31 L. Ed. 650 (1888).

Pullman Co. v. *Kansas*, 216 U. S. 56, 54 L. Ed. 378, 385 (1909) (Concurring opinion of Mr. Justice White).

As the plaintiff-in-error is neither in the employ of the Federal government nor engaged in foreign commerce in Virginia, there can be no question of the right of that State to affix to the privilege of allowing the plaintiff-in-error to do business within its limits the conditions provided by the statute in question, and to require the plaintiff-in-error to comply with these conditions as a prerequisite to doing business in that State, unless the business done in the State is interstate business, or, to be more correct, unless the business done in the State is such a business as is protected by that provision of the Constitution which gives to Congress the right to regulate commerce between the States. We say "to be more correct" for it was pointed out by the present Chief Justice of this court, in delivering the opinion in *American*

Steel & Wire Co. v. *Speed*, 192 U. S. 500, 521, 48 L. Ed. 538, 547 (1903) that, though goods may not have completely lost their character as interstate commerce, yet they may have been so dealt with that a tax on them would not amount to a regulation of interstate commerce in the sense of the Federal Constitution, although its levy may remotely and indirectly affect interstate commerce. So, the State of Virginia can impose such conditions as is deemed expedient on the plaintiff-in-error as a prerequisite to permitting it to do in that State a business that is not protected by the commerce clause of the Federal Constitution, though such business may not have completely lost its interstate character. In other words, is the business which the State of Virginia forbids the plaintiff-in-error from doing, without complying with certain conditions, such a business as is protected by that clause of the Constitution of the United States which provides that Congress shall regulate commerce between the States? If not, then the State can forbid such business from being conducted or place such conditions on the privilege of doing such business within its borders, as it may deem expedient.

Counsel for the plaintiff-in-error appears to recognize these principles and confines his assignment of error as follows (R. pp. 96-7):

> "The Supreme Court of Appeals of Virginia erred in holding that the defendant is not engaged in interstate commerce and is therefore subject to a fine for transacting business in the State of Virginia, without first obtaining a certificate of authority from the State Corporation Commission and paying the fee required by statute.
>
> The said errors are more particularly set forth as follows:
>
> The Supreme Court of Appeals of Virginia erred in holding and deciding that the defendant is not engaged in interstate commerce:
>
> (1) When a machine manufactured by said defendant in Ohio is shipped to Virginia for the purpose of sale and is left on trial with a prospective customer, who subsequently signs an order for the purchase of the identical machine in his possession, and this order is sent for approval to defendant at its home office in Ohio, in accordance with the provisions of said order requiring its approval at the executive

office of the company in Ohio before it becomes a contract between the parties:

(2) When the defendant rents to a person in Virginia a machine shipped into the State from Ohio, and collects rent for the use thereof, which rent, in case the renter subsequently decides to buy that particular machine, is credited on the purchase price, and the contract of rental, in accordance with its provisions, is not effective until approved and accepted by the defendant at its office in Ohio:

(3) When the defendant, in making a sale, receives a machine made by another manufacturer in exchange for its machine, and disposes of said machine so received, under a written contract requiring the approval of the defendant at its office in Ohio, before such contract becomes effective:

(4) When the defendant, in fulfilment of its guarantee to purchasers to keep a machine in repair for a definite period, as one year, pays a mechanic in Virginia for looking after the machines, as they get out of order or require repairs, or enters into contracts with purchasers of machines to keep them in order for a stipulated sum per year, and collects charges therefor, billing the invoices for such charges from its home office in Ohio:

(5) When the defendant keeps on hand in Virginia with its salesman or solicitor, certain small parts of machines, ribbons and rolls of paper suitable for use upon said machines which are sold from time to time to the users of its machines in said State, billing the invoices for such sales from its home office in Ohio."

It will be seen that the plaintiff-in-error complains because the Supreme Court of Appeals of Virginia did not decide that the businesses enumerated is interstate commerce, and this is its only complaint against the decisions of the Supreme Court of Appeals of Virginia in this matter. The Supreme Court of Appeals of Virginia has construed the words "doing business in this State" to include the business transacted by the plaintiff-in-error and above enumerated in his assignments of error. The whole question, therefore, before this court, is whether or not the businesses above enumerated and carried on by the plaintiff-in-error in the State of Virginia are such businesses as are protected by the commerce clause of the Federal Constitution, or whether the State can impose conditions upon the doing of such businesses without regulating interstate commerce in the sense of the Federal

Constitution. We have seen that though a business may not have completely lost its interstate character and may be still remotely and indirectly connected with interstate commerce and at the same time not come within the protection of the commerce clause. In the future discussion of this case, therefore, we shall use the words "local or intra-state business" to designate such businesses carried on within the State, as are not protected by the commerce clause of the Federal Constitution, or such businesses as the State may impose burdens upon without such burdens amounting to regulation of interstate commerce in the sense of the Federal Constitution.

As, therefore, no question of discrimination is involved, we shall make no reference to such question.

ARGUMENT.

THE PLAINTIFF-IN-ERROR IS DOING BUSINESS IN VIRGINIA.

It is patent from the statement of facts that the plaintiff-in-error is doing business in Virginia. *International Text Book Co. v. Pigg*, 217 U. S. 91; 54 L. Ed. 678, (1910). It is fully admitted in the testimony and in the brief of plaintiff-in-error, filed in this court. The gist of the whole matter is the character of business that has been and is being carried on. The plaintiff-in-error contends that all of the business carried on by it is interstate business, while the Commonwealth of Virginia contends that a portion of said business is purely local and intra-state business and in no way connected with its interstate business.

(A) *The plaintiff-in-error is engaged in interstate business in Virginia upon which the State can impose no burden.*

It is frankly conceded that if the plaintiff-in-error confined itself to that method of business, which we have designated in the statement of facts detailed herein as its "interstate method" it could not be required to take out a license, nor would it be necessary for it to comply with the statute in question. About two-thirds of the business is done by this method and the Supreme Court of Appeals of Virginia has construed this method as not

within the meaning of "doing business in this State, as contained in the statute in question." In delivering the opinion in this case, the court said (R. p. 81):

> "The agent exhibits a sample machine to the customer, and if the customer desires to buy he signs an order for a machine, describing its accessories accurately, addressed to the Dalton Adding Machine Company at its home office; if satisfactory to the customer, a machine is shipped from the factory either to the customer or to the agent in Virginia, to be delivered to the customer.
>
> As to this part of the business there is no difference of opinion. It is strictly interstate commerce, protected by the commerce clause of the Constitution, and the State can impose no condition, license tax, or any other burden whatever, upon such business."

The court recognized that line of cases which established beyond question that the taking of orders in Virginia for goods which are subsequently shipped to Virginia from another State in response to such orders, is an interstate transaction, and cannot be burdened by local laws and, recognizing the principles laid down by this line of cases, the Supreme Court of Appeals of Virginia construed the statute in question as not contemplating such business by the words "doing business in this State," and this Honorable Court will follow the construction of the Supreme Court of Appeals of Virginia, for it is well-established that the construction of a State statute, by its highest court, is not open to review.

Armour Packing Co. v. *Lacy*, 200 U. S. 226, 234; 50 L. Ed. 451, 456 (1906).

Osborne v. *Florida*, 164 U. S. 650; 41 L. Ed. 586 (1896).

The excerpt above from the decision of the Supreme Court of Appeals of Virginia in this case is a complete answer to statement of counsel for plaintiff-in-error in their brief (p. 12) that the effect of the decision of the Virginia Court is to exclude from the protection of the commerce clause of the Constitution all sales of machines shipped into Virginia *prior* to the sale thereof, irrespective of the *manner* of sale.

(B) *The fact that the plaintiff-in-error is doing an interstate business in Virginia does not exempt it from complying with the laws of that State before doing therein a local or intrastate business separable from its interstate business.*

A foreign corporation cannot defend its right to do a strictly local or intrastate business (and by this, as we have said, we mean a business not protected by the commerce clause of the Federal Constitution) without complying with the laws of the State in which that business is carried on by pleading that it is also carrying on within that State an interstate business, for it would appear to be now settled beyond controversy that if a foreign corporation is engaged in both interstate business and intrastate business, that State may impose such conditions as its deems expedient upon such corporation for the privilege of doing the intrastate business, even though such corporation is mainly engaged in an interstate business of like character and kind; provided the interstate business is so separated from the intrastate business that the imposing of conditions for the privilege of doing the intrastate business would not regulate or place a burden upon the interstate business. So, where the statute which imposes a license tax is general in its terms, if its operation is confined strictly to the intrastate business of the foreign corporation, and a compliance with the statute is not made a condition precedent to such corporation doing an interstate business, the statute is constitutional. These principles have oftimes been recognized by this court, and it now seems settled beyond controversy.

Osborne v. *Florida*, 164 U. S. 650; 41 L. Ed. 586 (1896).

Pullman Co. v. *Adams*, 189 U. S. 420; 47 L. Ed. 877 (1902).

Kehrer v. *Stewart*, 197 U. S. 60; 49 L. Ed. 663 (1905).

Baltic Min. Co. v. *Mass.*, 231 U. S. 68; 58 L. Ed. 127 (1913).

Singer Sewing Marchine Co. v. *Brickell*, 233 U. S. 304; 58 L. Ed. 975 (1913).

In *Osborne* v. *Florida*, *supra*, the agent of the Southern Express Co., a Georgia corporation, was convicted for doing business in Florida without having paid the license tax provided by the State of Florida. The Supreme Court of the State of Florida sustained the conviction and the case came to the court upon a

writ of error to the State court. It appears that the Company was doing in the State, both an interstate and a local business. One ground upon which a reversal of the judgment of the State court was sought, was based upon the allegation that the statute, so far as regards the Southern Expres Company or the defendant, as its agent, violated the commerce clause of the Federal Constitution in that it assumed to regulate interstate commerce. The court, after declaring that if the statute applied to the Express Co., in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce, continued by saying (p. 654 of U. S. Report):

> "The Supreme Court of Florida has construed the 9th section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company, which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as it is termed, 'local' in its character, and it has held that, under that statute, so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provisions of the statute, if the company engage in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute, as construed by the Supreme Court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a busines which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed, we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution."

The court then distinguishes the case of *Crutcher* v. *Ky.*, 41 U. S. 47, 35 L. Ed. 649 (1891) and continues by saying (p. 655 of U. S. Rep.):

> "It has never been held, however, that when the business of the company which is wholly within the State is but a

mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher Case*, that 'taxes or license fees in good faith, imposed exclusively on express business carried on wholly within the State, would be open to no such obejction,' *viz.*, an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard."

In *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663 (1905), the court said (p. 69 of U. S. Rep.):

"* * * If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it, as we held in *Crutcher* v. *Kentucky*, 141 U. S. 47; but if the agent carried on a definite, though a minor, part of his business in the State by the sales of meat there, he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax. There could be no doubt whatever that, if the agent carried on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view it makes no difference that the two branches of business are carried on in the same establishment. The burden of proof was clearly upon the plaintiff to show that the domestic business was a mere incident to the interstate business."

There could be no doubt whatever that, if the plaintiff-in-error carries on his interstate and domestic business in two distinct establishments, one would be subject and the other would not be subject to the tax, and in our view, it makes no difference that the two branches of business are carried on in the same establishment.

The statute under review in *Baltic Min. Co.* v. *Mass.*, *supra*, is very similar to the Virginia statute now under review, the statute in that case requiring foreign corporations to file certain certificates and to pay certain taxes before being permitted to do business in the State, and as the company in that case was engaged both in interstate and intrastate business in Massachusetts, it was claimed that the statute was a regulation of interstate commerce and therefore invalid. The court held that as the local and domestic busines for the privilege of doing which the State had imposed a tax, was real and substantial, the State had a right to require the corporations to comply with the statute before doing such domestic business in the State, even though the corporations here were doing a strictly interstate business.

In *Singer Sewing Machine Co.* v. *Bricker*, *supra*, this court reviewed a statute of Alabama which required each person, firm or corporation selling or delivering sewing machines either in person or through agents, to pay an annual tax for each county in which they sold or delivered said article. A suit was brought to enjoin the enforcement of said statute on the ground that it violated the commerce clause of the Federal Constitution. The State court sustained a demurrer to the bill, except as to one county, which was a border county wherein it was shown that the method of doing business constituted interstate commerce. This court sustained the position taken by the State court in holding that in all of the counties except the border county, the business done was intrastate commerce, while the business done in the border county constituted interstate commerce. It was contended in this court that the State court, could not properly sustain a statute by restricting it to cases of actual inerference with interstate dealing. On this point, this Honorable Court, speaking through Mr. Justice Pitney, said (p. 313 of U. S. Rep.):

> "This argument, we think, misses the point. The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair effect can be given to its provisions, and an unconstitutional meaning can be avoided, by indulging the natural presumption that the legislature was intending to tax only that which it constitutionally might tax. So construed, it does not apply to interstate commerce at all. The

statute provides for a license or occupation tax. Normally, as the averments of the bill sufficiently show, the occupation may be and is conducted wholly intrastate, and free from any element of interstate commerce. The fact that, as carried on in Russell county, a like occupation is conducted with interstate commerce as an essential ingredient, is wholly fortuitous.

Nor has the tax that "unity of character' upon which the argument necessarily depends. The cases cited in support of the insistence that the act must be adjudged totally void because, if applied in Russell county, it would burden interstate commerce, are readily distinguishable. * * *"

The court then proceeds to distinguish the cases which have been cited and continues in the following language (p. 314 of U. S. Rep.):

"The statute now under consideration differs materially, in that it deals separately with the business as conducted in each county of the State, and provides for separate taxes to be laid for each county. And the facts as averred in the bill of complaint show that with respect to all of the counties in which appellant does business, excepting only the county of Russell, there is no element of interstate commerce. In each county there is a store or regular place of business, from which all of the local agents for the same county are supplied with sewing machines and appurtenances that are to be taken into the rural districts for sale or renting, and all transactions that enter into the sale or renting are completely carried out within a single county.

It would be going altogether too far to say that appellant, being properly taxable and without the least interference with interstate commerce, in twenty-nine counties of the State, could obtain immunity from all such taxation by establishing in one county a system of business that involved transactions in interstate commerce."

Therefore, it is evidently well-settled that the fact that the plaintiff-in-error is doing in Virginia an interstate business, to which the statute in question does not apply, does not exempt it from becoming subject to this statute, so far as concerns any local or intrastate business, separate and distinct from its interstate transactions which it does in that State. If the business for the privilege of doing which the State of Virginia has imposed

a tax, is a real and substantial local or domestic business, and not so connected with interstate commerce as to render a tax upon it a burden upon interstate commerce, the State is clearly within its rights in imposing such tax upon the plaintiff-in-error before allowing it to do such local business, even though it also does an interstate business.

(C) *The plaintiff-in-error is engaged in local or intrastate business in Virginia, which is entirely separate from its interstate business, and which that State may regulate or directly burden.*

(1) *In that it brings machines into Virginia in response to no contract and sells these identical machines after they have come to rest in the State.*

The evidence shows that the plaintiff-in-error ships machines from its factory in Ohio to Virginia generally to its place of business in Richmond, Virginia—or, if counsel for the plaintiff-in-error objects to calling this the place of business of the plaintiff-in-error, we will call it the place of business of its agent—in response to no order or contract in relation thereto, and after they have reached their destination they are exhibited at such place of business and offered for sale to the general public. Generally, however, instead of the machines being sold at such place of business, they are distributed to the places of business of various prospective purchasers for trial without any previous order having been given therefor, and afterwards, these identical machines are sold or rented to those who are satisfied with the results secured from the use of the machines in their places of business. At least one-third of the sales of the plaintiff-in-error in Virginia are the result of sending machines to this State, not to fill orders previously obtained, not to be delivered to any designated person, *not to be used purely as samples*, but for the purpose of placing those identical machines upon the open market in that State and securing purchasers for them after they have reached their final destination after all interstate movement has ceased. They are shipped into Virginia and come to rest in that State and become a part of the general property of that State, to be sold in that State just as other property is sold with nothing to distin-

guish them from the mass of property in that State. The plaintiff-in-error ships machines into Virginia as its own property and *retains title thereto until sold*, and puts them in the hands of prospective purchasers to test, and then proceeds to sell or rent these identical machines, the entire contract of sale being made and completed after the machines have come to rest in that State. The machines arrive at their destination and are at rest in Virginia before negotiations of sale are opened. Moreover, the assent of the purchaser is given in Virginia and the property delivered in Virginia, and we submit that such a sale is purely a local or intrastate transaction.

It is well established that where goods are brought from one State into another, in response to no contract, but after they have reached their destination and come to rest in that State, those identical goods are offered for sale, that such transaction is not protected by the commerce clause of the Federal Constitution, but is purely a local or intrastate transaction to be governed and regulated by the laws of the State, where the transaction takes place.

In conducting such transactions, the plaintiff-in-error is exercising a privilege not immediately connected with interstate commerce or required for the purposes thereof, but it is exercising *purely a local privilege* controlled by such regulation as the State in which the transaction takes place may deem expedient and proper. Many times has this Honorable Court pronounced such business as purely internal and domestic and such occupation and goods used therein are subject to the taxing power of the State in which the business was carried on.

In all these cases a clear distinction is drawn between the case in which goods are shipped from one State to another, subsequent to and consequent upon a valid contract in relation to such goods, and the case in which goods are brought into a State in response to no contract, nor intended for any special customer and after they have come to rest in such a State and are mingled with the mass of goods of the State and offered for sale. The first case has uniformly been held to be interstate commerce, and the second has been as uniformly held to be intrastate or local transaction.

Howe Mach. Co. v. *Gage*, 100 U. S. 676, 25 L. Ed. 754 (1879).

Brown v. *Houston*, 114 U. S. 622, 29 L. Ed. 257 (1884).

Pittsburgh & S. Coal Co. v. *Bates*, 156 U. S. 577, 39 L. Ed. 538 (1894).

Emert v. *Mo.*, 156 U. S. 296, 39 L. Ed. 430 (1894).

American Steel & Wire Co. v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 (1903).

Kehrer v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663 (1904).

Armour Pack. Co. v. *Lacy*, 200 U. S. 226, 50 L. Ed. 451 (1905).

Gen. Oil Co. v. *Crain*, 209 U. S. 211, 52 L. Ed. 754 (1907).

Bacon v. *Ill.*, 227 U. S. 504, 57 L. Ed. 615 (1912).

Susquehanna Coal Co. v. *South Amboy*, 228 U. S. 665, 57 L. Ed. 1015 (1913).

Baltic Mining Co. v. *Massachusetts*, 231 U. S. 68, 58 L. Ed. 127 (1913).

Browning v. *Waycross*, 233 U. S. 16, 58 L. Ed. 828 (1914).

One of the earliest cases is that of *Howe Machine Co.* v. *Gage*, *supra*. In this case, a Connecticut corporation manufacturing sewing machines company at Bridgeport, Connecticut, sent an agent into Sumner county, Tennessee, for the purpose of peddling these machines. The agent traveled through the county exhibiting the machines and selling the identical machines which he had with him. It was held that he was subject to a license tax placed by the State on all peddlers for selling sewing machines. The Supreme Court of the State sustained the tax and this Honorable Court held that such tax was not repugnant to the Constitution of the United States.

In *N. & W. R. R. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254, 256 (1903) *supra*, the court, in distinguishing *Howe Machine Co.* v. *Gage*, from the case then under discussion, said that in the *Howe Machine Co. Case*, it appeared that the sale was made and wholly made in the State of Tennessee, and apparently from a stock kept in that State through an agent of the Company, and that the case was not similar to a case in which a machine was shipped into the State by a non-resident manufacturer upon the written order of a customer under an ordinary C. O. D. consignment.

In *Brown* v. *Houston*, 114 U. S. 622, 29 L. Ed. 259 (1884), *supra*, coal was sent by flat boats by the owners in Pennsylvania, to their agents in New Orleans to be there sold for their account. Upon its arrival at New Orleans, and while still afloat in the Mississippi River on these boats, a tax was levied, and such action by the State authorities was sustained by the Supreme Court of Louisiana. The matter came to this Honorable Court, and the second assignment of error was that the levying of a tax was in violation of the clause of the Federal Constitution which gives to Congress the power to regulate commerce between the various States. This court reviewed many authorities and decided that as the property had reached its destination, and had become a part of the general mass of property in the city, there was no interference with commerce between the States. Mr. Justice Bradley, in delivering the opinion of the court, said (p. 632 of U. S. Rep.):

> "* * * In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.
>
> This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania into the State of Louisiana, and the free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.
>
> As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for

final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. * * * "

After setting out certain illustrations in regard to taxation, the court continues as follows (p. 634 of U. S. Rep.):

"When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

In our opinion, therefore, the second assignment of error is untenable."

So, in the case at bar, the machines have arrived at their destination before they are put up for sale. In fact, in many cases they are distributed among prospective purchasers. They have come to a place of rest in the State of Virginia for final disposal or use and are a commodity in the market of the State, and therefore, any transaction in regard to the same is a purely local or intrastate transaction and does not come within the protection of the commerce clause of the Federal Constitution.

In *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430 (1895), *supra*, the defendant was found guilty of peddling goods within the State of Missouri without a license, a statute of that State requiring every peddler to procure a license and pay a tax therefor as a condition precedent to peddling in the State. The facts were that the defendant was the agent of a sewing machine company of New Jersey, who sent its machines from its factory in New Jersey to the defendant in Missouri to be sold for its account, the titles to the machines remaining in the New Jersey

company until they were sold. The defendant took the machines in a wagon and drove from place to place, selling the identical machines carried about with him. This court held that the statute as applying to the occupation of the defendant, was not repugnant to the power of Congress to regulate commerce, but was a valid exercise of the powers of the State over persons and business within its borders. Mr. Justice Gray, in delivering the unanimous opinion of the court, said (p. 311 of U. S. Rep.):

> "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another: and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State."

The court then examines, with great care, and discusses at great length, the various decisions upon the subject of powers of the several States as affected by the grant to Congress by the Federal Constitution of the power to regulate commerce, and points out that, even those decisions which held the statute considered therein as repugnant to the commerce clause of the Federal Constitution, uniformly recognized the right of the State to tax property which has come to its place of rest within its borders for final disposal or use. The court points out that the sale of goods already within the State though brought from another State, is a very different thing from the sale of goods or offer of sale before they are brought into the State and, in distinguishing between the negotiation of the sale of goods which are in another State, when the sale is had and the negotiations of the sale of goods already in the State, where and when the sale is made, said (p. 319 of U. S. Rep.):

"The decision in *Howe Mach. Co.* v. *Gage*, *supra*, *as to a peddler, carrying with him for sale goods already in the State, was thus expressly recognized, and was distinguished from the case, then before the court, of a drummer, selling, or soliciting orders for, goods which were at the time in another State.* And in the dissenting opinion, delivered by Chief Justice Waite, in which two other justices concurred, it was assumed, as incontrovertible, that another provision of the same statute, requiring a license fee from all peddlers within the district, *could not be held unconstitutional in its application to peddlers who came with their goods from another State, and expected to go back again.*" 120 U. S. 501 (Italics ours).

Again in *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. Ed. 538 (1895), it was held that the coal in barges shipped from Pennsylvania to Louisiana for the purpose of sale, and which was stopped about nine miles above its destination, had ceased to be interstate commerce and was subject to taxation by the State of Louisiana, *and that such taxation was not a regulation or restraint upon commerce of the State and did not violate any provision of the United States Constitution*," the decision being based on the principles laid down in the case of *Brown* v. *Houston*, 114 U. S. 622, 29 L. Ed. 259 (1884), *supra*.

The case of *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 (1903) appears to be decisive of every contention urged by the plaintiff-in-error in the case at bar. In that case, a New Jersey manufacturing corporation selected Memphis, Tennessee, as a distributing point for its products, none of which were manufactured in the State of Tennessee, and secured a local transfer company to take charge of its products when shipped to Memphis, assort them, store them at a warehouse, and make delivery in the original packages to the customers of the manufacturer, either as expressly directed by it or under general direction in favor of its recognized and approved customers, whose names were furnished to the transfer company. A general merchant's tax and a merchant's privilege tax to do business in the State, was assessed against this non-resident corporation in Tennessee, and the tax was resisted on the ground that it was repugnant to the commerce clause of the Constitution of the United States. It

was held that the State was not precluded by the commerce clause of the Federal Constitution from imposing these taxes, since the goods, when stored in the warehouse, were no longer in transit, but on the contrary had reached their destination at Memphis and were there held in store at the risk of the Steel Company to be sold and delivered, as contracts for that purpose were completely consummated. So, in the case at bar, the machines, for the sale of which the State of Virginia requires the plaintiff-in-error to pay a privilege tax, have reached their destination at Richmond (or other points in the State to which they are sent) and are held there, either at their agent's place of business or at the place of business of a prospective purchaser, *and at the risk of the plaintiff-in-error*, to be sold and delivered as contracts for that purpose are completely consummated. The various decisions on this question were discussed by Mr. Justice White in handing down the opinion of the court, and it was very clearly shown that after goods have arrived at their destination and are at rest in the State, the regulation of interstate commerce in the sense as used in the Federal Constitution does not follow such property. There are so many striking similarities between that case and the case at bar, that we deem it pertinent to call attention to some of them. In that case, the goods were sent into the State for sale without any prior order therefor, and came to rest in the State. In the case at bar the machines are sent into Virginia, for sale, without any prior order therefor, and come to rest in the State. In that case the goods were received by a local transfer company, who had no interest in the goods, and who could not sell them. In the case at bar, the goods are sent to the agent in Richmond, who, it is claimed, has no interest in the goods and cannot sell them. In that case the manufacturing company went further even than it does in this case, and claimed that the transfer company did not even know the price of the goods and that its connection with the company's products was confined to their transfer to the warehouse, assortment and consequent delivery to the customer upon orders from the company. In the case at bar, the plaintiff-in-error admits that its agent knew the price and could deliver the goods even before orders to so do have been received by the agent from the plaintiff-in-error. In that case, the excuse

for the transaction of the local business was that it was convenient for the Steel Company to mass its products at a given point where they could be assorted, and that it was impractical to assort them at the landing, and that the warehouse was secured to facilitate the assortment and distribution of its property, and that, further, it took advantage of the seasons when there was a good stage of water in the rivers which must be used in floating its products from its mills to Memphis.

So, in the case at bar, the excuse for sending its property to this State and accumulating it here prior to the sale, and distributing it over the State to various prospective purchasers, is that, owing to the nature and peculiarity of machines, it is necessary that parties be given opportunity to examine, try and test them before purchasing. In that case, the transfer company could not sell the products and the sales agent reported all contracts effected by them directly to the officer outside of the State, wherever a contract was made, and that the goods were delivered upon orders from the Steel Company to the transfer company and that all invoices for goods were forwarded from the office outside the State, directly to the customer. So, in the case at bar, it is claimed that an agent has no right to sell or convey the title to the machines of the plaintiff-in-error, but after delivering a machine, he must send the order to the office in Ohio, and that all invoices are sent from Ohio directly to the customer. In that case, the title to the goods shipped remained in the Steel Company and at its risk, and the same is true in the case at bar.

But the court threw aside all such niceties and looked entirely to the substance of the transaction and held that as the goods were not in transit, but had come to rest at their destination at Memphis and were held there to be sold and delivered as contracts for the purpose were completely consummated, that the sale of such products was entirely a local transaction outside of the protecting arms of the commerce clause of the Federal Constitution, subject to State legislation in regard thereto, and that, therefore, the State had a perfect right to compel the Steel Company to pay a privilege license as a pre-requisite to engaging in such sales. So, in the case at bar, the State of Virginia has the same right to require the plaintiff-in-error to fulfil the conditions im-

posed upon it by the statute in question as a condition precedent to its engaging within its borders in the purely local business which is now under discussion.

In *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663, 666 (1905), an Illinois firm engaged in the City of Chicago in packing meats for sale, had a place of business in Atlanta, Georgia, for the sale of their products at wholesale. The firm had no packing house in Georgia, but took orders which were transmitted and filled in Chicago, and the meats sent to Chicago and there filled in pursuance of such orders. Certain meats were also shipped from Chicago to Atlanta without *on a previous sale or contract to sell.* They were stored in Atlanta in the original packages and kept and held for sale there in the ordinary course of trade. The Supreme Court of Georgia held that a tax, so far as applied to meats sold in Chicago and shipped to its employee in Georgia for distribution, could not be supported, but that so far as such employee was engaged in the business of selling directly to consumers in Atlanta he was engaged in carrying on an independent business as a wholesale dealer, and was liable to the tax, and the position of the Supreme Court of Georgia was sustained by this court. Mr. Justice Brown, in delivering the opinion of this court, recognized that the business of selling meats, which were shipped from Chicago to Atlanta, before sale was the carrying on of a purely domestic business, and stated that it made no difference in principle, that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon their arrival there, they became a part of the taxable property of the State, and it made no difference whence they came and to whom they were ultimately sold. If the business carried on and investigated by this court in that case was pronounced a purely domestic business, we submit that under that ruling the plaintiff-in-error is doing a local or domestic business in the State of Virginia.

Again, in *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 50 L. Ed. 451 (1906) is a case which, we submit, is, in all respects, similar to, and decisive of, the case at bar. In that case it was contended by the Armour Packing Company that it was not engaged in doing a packing house business in North Carolina and that the

tax was an interference with interstate commerce. Mr. Chief Justice Fuller, in delivering the opinion of the court, which affirmed the Supreme Court of N. C., said (p. 233 of U. S. Rep.):

"The court (i. e., Supreme Court of N. C.), said:

'If the business of the defendant was solely that of shipping food products into this State, consigned directly to purchasers on orders previously obtained, it is clear that this would be interstate commerce and a tax laid by the State upon such business would be illegal. *But the defendant does a large business within the State, the selling of products already stored here on orders received after these products are thus stored.* The tax is laid upon every meat packing house 'doing business in this State.' The evident meaning of the legislature is to tax the agency 'doing business within this State.' and not to lay any tax upon the interstate commerce of shipping products into the State to be directly or indirectly delivered to purchasers whose orders were obtained before the goods were shipped.'

And, after recapitulating from the agreed statement the particulars of the business transacted in North Carolina, the court applied the rule that the legislature could prescribe such conditions as it saw fit on the transaction of business by a foreign corporation within the State, and held that the license tax was the condition upon which defendant was permitted to do the business so described; and cited *Osborne* v. *Florida*, 164 U. S. 650, as decisive on the question that the license tax applied only to business within the State and not to that which was interstate in its character; and added: 'The defendant doing business in this State and the license tax being exacted only by virtue of its intrastate business, the first two grounds of objection are overruled.'

As was said in *Osborne* v. *Florida*, this construction of a State statute by its highest court is not open to review; and accepting it the case plainly comes within *Kehrer* v. *Stewart*, 197 U. S. 60. * * * " (Italics ours).

In *General Oil Co.* v. *Crain*, 209 U. S. 211, 52 L. Ed. 754 (1908) oil shipped from Pennsylvania and Ohio and destined for points in Louisiana, Arkansas and Mississippi was sent to Memphis, Tennessee, where they were unloaded from tank cars into various tanks and other receptacles from which it was forwarded to its final destination. It was held by this court that this prop-

erty was not interstate commerce, so as to be exempt from State taxation. It was contended by the Oil Company, that the oil in the tanks was in transit and that the delay at Memphis was merely for the purpose of separation, distribution and re-shipment, and was not there no longer than was required by the nature of the business and the exigencies of transportation, and that interstate transit never finally ended in Memphis but was only temporarily interrupted there. But the court, speaking through Mr. Justice McKenna, said (p. 230 of U. S. Rep.):

> "* * * The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State, &c.*, v. *Engle*, *supra*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'
>
> This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500."

So, in the case at bar, it is urged that the sending of machines to Virginia before sale, and allowing them to be given a locality in this State is purely for the purpose of allowing various prospec-

tive purchasers to test them before purchase, and that otherwise the plaintiff-in-error could not sell its machines, but we submit that this certainly describes a business—describes a purpose for which the machines are brought to rest in the State of Virginia and for which the protection of the State is necessary—a purpose outside of the mere transportation of the machines, and before the plaintiff-in-error can engage in the business of trafficking in such machines, it must fulfill the conditions imposed upon it by the State of Virginia as a pre-requisite to doing such local business.

Again, in *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615 (1912), this court held that property sent from one State to a second State and intended eventually to be sent to a third State, but held in the second State for the purpose deemed by the owner to be beneficial, was not in actual transportation, and that therefore, there was nothing inconsistent with the Federal authority in compelling the owner to bear with respect to this property in common with other property in the State, his share of expenses in the local government.

This court, in the case of *Susquehanna Coal Co.* v *South Amboy*, 228 U. S. 655, 57 L. Ed. 1115 (1912), in passing upon the question of the right of exemption from local taxation in New Jersey of Pennsylvania coal, shipped by its Pennsylvania owner to its own order at a New Jersey water port, where, if no bottoms were available for its continued transportation, it was dumped into a storage yard to be later transferred to bottoms, as the case required, [redacted] said (p. 669 of U. S. Rep.):

> "The coal, therefore, was not in actual movement through the State: it was at rest in the State and was to be handled and distributed from there. Therefore, the principles expressed in *General Oil Co.* v. *Crain*, 209 U. S. 211, and *Bacon* v. *Illinois*, 227 U. S. 504, are applicable to it. The products in neither of those cases were destined for sale in the States where stored; the delay there was to be temporary, a postponement of their transportation to their destinations. There was, however, a business purpose and advantage in the delay which was availed of, and while it was availed of, the products secured the protection of the State. In both cases it was held that *there was a cessation of interstate commerce and subjection* to the dominion of the State."

So, in the case at bar, when the machines of the plaintiff-in-error have arrived in Virginia, where they are destined for sale, it was for a purely local business purpose, namely: to sell the same in that State, and there was a cessation, therefore, of interstate commerce when they come to rest in this State and they thereby become subject to the dominion of the State of Virginia.

The case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 58 L. Ed. 127 (1913), is very similar to and the reason therein applicable in all respects to the case at bar. In that case, the Baltic Mining Company, a Michigan corporation and mining copper in Michigan, had an office in the city of Boston for the use of its president and treasurer, residing in Boston, for the general financial management of its affairs, but had no property in Massachusetts except its bank deposit and a certificate of stock in another corporation. The Copper Range Consolidated Company owned certain shares of its stock and also had a place of business in Boston. The United Metal Selling Company, a New Jersey corporation with its principal office in New York City and with no office in Massachusetts, had the exclusive agency, for marketing the Baltic Mining Company's copper, *it making no sales directly itself*. Considerable quantities of copper were sold for delivery in Massachusetts and transported from the Michigan smelter directly to the purchaser. *In exceptional instances sales were made in Massachusetts for delivery there, but this was out of the usual course of business, not more than five per cent. of the sales being so made, the larger part being regularly consummated in New York City.* A Massachusetts statute required all foreign corporations to file annually with the proper officer of the State of Massachusetts, a certificate of their capital stock, assets and liabilities, and also to pay to the treasurer of the State a certain tax as a condition precedent to its doing business in the State. These corporations objected to the imposition of these conditions upon them as a pre-requisite to their doing business in the State, on the ground that it was a regulation of interstate commerce. The court said (p. 86 of U. S. Rep.):

> "An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have under-

taken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the State. In the cases at bar, the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the Federal Constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a State to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. * * * "

There appears to be one case in which the question at issue here was directly and specifically raised. *Roselle* v. *Commonwealth*, 223 U. S. 716, 56 L. Ed. 627 (1912). In that case the question was whether picture frames brought from another State into Virginia without any previous order therefor, and the sale of the same negotiated after the frames had arrived in that State, was an interstate or intrastate transaction. The Virginia court held that it was intrastate commerce and that the State had a right to compel the salesman of such frames to pay a license tax for selling them, saying (110 Va. 235, 238):

> "The test which seems to determine whether the transaction is to be regarded as belonging to interstate or to intrastate commerce is whether the property which is the subject matter of the sale is within the jurisdiction of the State at the time the sale is made."

This court, in 223 U. S. 716, 56 L. Ed. 617, affirmed the opinion of the Court of Appeals of Virginia.

These decisions sustain the position of the Commonwealth of Virginia that after the machines have been shipped to Virginia without any previous order therefor, and have come to rest in that

State for the purpose of sale to the general public, they will no longer be protected by the commerce clause of the Federal Constitution; that they have become divested of any connection with the commerce between the States; that the business of selling within the State such machines is a purely local and domestic business; that such business is "wholly separate from interstate commerce, involving no question of delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerns merely the doing of a local act after interstate commerce has terminated."

At the risk of tiresome recitation, we have reviewed the decisions of this honorable court bearing on the question at issue, because of the insistence of counsel for the plaintiff-in-error in their brief before this court that there is no distinction between the case of machines sent to Virginia to fill a sale previously made, and the case of machines sent to that State without any previous order therefor, but purely for the purpose of placing on the local State market for sale to the general public. Nor, as we have shown, do the decisions sustain this position. It is very striking that even those cases which held the statute under consideration therein repugnant to the commerce clause o fthe Federal Constitution, expressly called attention to the fact that the goods were only shipped to the State after sale.

Thus, in *Rearick* v. *Pennsylvania*, 203 U. S. 507, 51 L. Ed. 259 (1903), *supra*, Mr. Justice Holmes, in delivering the opinion of the court, called attention to the fact that no shipments were made except to fill orders already obtained. In *Crenshaw* v. *Arkansas*, 287 U. S. 65, 37 L. Ed. 565, it was expressly stated that the ranges intrusted to the salesman were never sold, but in all cases, were sent from out of the State in response to an order previously obtained.

In *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, Mr. Justice Shiras, who delivered the opinion of the court, called attention to the fact that the business was confined to the delivery of pictures and frames for which contracts of sale had been previously made, and we submit that this distinction runs all through the cases dealing with transactions claimed to be protected by the commerce clause of the Federal Constitution.

Counsel for the plaintiff-in-error has devoted almost his entire brief filed in this court to excerpts from the various decisions of this court, inferior Federal courts and State courts, without giving the context of these cases or in any way attempting to show their bearing on the case at bar. We have no desire to question the decisions in the cases of this court cited by him and the extracts taken from them, read in connection with what precedes and what succeeds it, in no way conflicts with the position which has been taken in this brief.

We deem it unnecessary to discuss these cases seriatim, as they in no way affect the conclusion reached above from the decisions herein reviewed, but we submit that after a careful reading of these authorities, we are forced to the conclusion that they in no respect sustain the contention that the various lines of business engaged in by the plaintiff-in-error in Virginia and under consideration by this honorable court, are interstate transactions protected by the commerce clause of the Federal Constitution.

Counsel for plaintiff-in-error states that, as the right to ship includes the right to sell, it makes no difference whether the goods are sold before shipment or whether they are allowed to come to rest in Virginia and then sold, and excerpts from many decisions to show that the right of transportation includes the right of sale.

We admit that the regulation of interstate commerce includes not only transportation, but the necessary incidents of purchase and sale, but such regulation does not include within its protection such transactions as are here involved, where the machines are first transported to Virginia and after they have reached their destination and are at rest in this State and after all rights of interstate commerce have been allowed, negotiations for the sale of these *identical* machines are begun, which result in their sale in this State.

There is no attempt on the part of the State to forbid their sale, because they are brought from another State. The State of Virginia recognizes the right of the plaintiff-in-error to sell the machines brought from another State and does not prohibit the sale of the same on that account, but it *does* claim that the sale of the machines in question involves no question of the delivery of

the property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, by the doing of a purely local act after interstate commerce has completely terminated." (*Browning* v. *Waycross*, 233 U. S. 16, *supra*).

Counsel indiscriminately cites to support his position, the cases of *Brown* v. *Maryland*, 12 Wheat. 419, 6. L. Ed. 678 (1827); *Bowman* v. *Chicago, etc., Rwy. Co.*, 125 U. S. 465, 31 L. Ed. 712); *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128 (1889); *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862 (1891); *Wilkerson* v. *Rahrer*, 140 U. S. 545, 35 L. Ed. 572; *Hopkins* v. *U. S.*, 171 U. S. 578, 43 L. Ed. 291 (1898), and *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650 (1888).

As to the case of *Bowman* v. *Chicago, etc., Rwy Co., supra*, if counsel for the plaintiff-in-error had begun the quotation in this case contained in his brief, at the beginning of a sentence or had continued his quotation one sentence further, he would have seen that this court refused expressly in that case to decide the matter which is contained in the quotation.

Be that as it may, we have no inclination to attempt to controvert any of the principles laid down in these cases and submit that there are no principles laid down in them which in any way sustain the contention with which they are cited by counsel for the plaintiff-in-error to support. Counsel for the plaintiff-in-error does not attempt to show that there is a distinction between the rule governing in cases of imports (*Brown* v. *Maryland*, *supra*), and that governing interstate shipments (*Woodruff* v. *Parham*, 8 Wall. 123, 19 L. Ed. 382; *Leisy* v. *Hardin*, *supra*).

In American Steel & Wire Co. v. *Speed*, 192 U. S. 500, 48 L. Ed. 538 (1903), Mr. Justice White, in delivering the opinion of the court, called attention to the fact that the rule which governs a case where there is an absolute prohibition (as in the case of imports), is not applicable where no such prohibition obtains. In that case, after showing that *Brown* v. *Maryland*, *supra*, illustrates the first of these cases, and *Woodruff* v. *Parham*, *supra*; *Brown* v. *Houston*, *supra*; *Leisy* v. *Hardin*, *supra*, and *Lyng* v. *Michigan*, 135 U. S. 161; 34 L. Ed. 150 (1890), are examples of the other, the court continues as follows (p. 521 of U. S. Rep.):

"Thus, in *Brown* v. *Maryland*, there was an absolute want of power to tax imports, and it was held that a State enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff* v. *Parham* and *Brown* v. *Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a State so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Kehrer* v. *Stewart*, 197 U. S. 60, 69, 49 L. Ed. 663.
the point of destination, was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the State, were enjoying the protection which the laws of the State afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy* v. *Hardin* and *Lyng* v. *Michigan*, the same question in a different aspect was presented. The goods had reached their destination and the question was not the power of the State to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regulation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purpose of import taxation, and at a different period for the purpose of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of State authority considered in the respective cases."

But, confining the consideration of this subject to interstate commerce, there is a manifest difference between the case where the State law prohibits the sale of goods brought from other

States because of the fact that they were so brought, and the case where it regulates or burdens the sale of these goods after they have reached their destination and are at rest for sale in the State mixed with the other property in the State.

In the first case, the prohibition intercepts the goods on their way to become a part of the property of the State and denies them that privilege, while, in the latter case the privilege has already been exercised and the State may treat the goods as they find them. In the first case, the commerce clause continues its protection so as to secure to the goods the right to become a part of the property of the State, which right is guaranteed them by the commerce clause, while, in the second case, there is no attempt to prohibit the exercise of such right and the State may burden the sale as it deems proper, because such burden is not a regulation in the sense of the Constitution. In other words, in both cases the goods have reached their destination, but, in the first case, the question is not the power of the State to burden the goods or their sale, but its authority to treat them as not the subject of interstate commerce and to prohibit their sale. This is evidently a regulation in the sense of the Constitution. In the latter case, the question is not the power to prohibit the sale, but to burden the goods sold or the sale of them. This is evidently not a regulation within the constitutional sense. The cases of *Leisy* v. *Hardin*, *supra*, and *Lyng* v. *Michigan*, *supra*, illustrate the first of these cases, and *Brown* v. *Houston*, *supra*, *American Steel & Wire Co.* v. *Speed*, *supra*; *Armour & Co.* v. *Lacy*, *supra*, *Baltic Mining Co.* v. *Massachusetts*, *supra*, and other cases which we have heretofore reviewed, are illustrations of the other.

In *General Oil Co.* v. *Crain*, 209 U. S. 211, 229, 52 L. Ed. 754, 764 (1908), it is said that the ending of the transaction which constitutes interstate commerce is defined to be the point of time at which an article arrives at its destination, citing *Brown* v. *Houston*, 114 U. S. 622, 29 L. Ed. 257, as authority. To the same effect are many of the cases reviewed above, notably *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. Ed. 538 (1895); *Bacon* v. *Illinois*, 227 U. S. 504, 57 L. Ed. 615; *Susquehanna Coal Co.* v. *South Amboy*, 228 U. S. 665, 57 L. Ed. 1015 (1913).

It is clear, therefore, that, when the machines arrive at the office of the agent in Richmond, Virginia, interstate commerce in

regard thereto ceased, and it is admitted the State has a right to tax them. When, then, does interstate commerce begin again to protect the sale of these goods? Surely not when they are put on exhibition in the windows of the place of business in Richmond, nor when they are left with prospective purchasers for trial, nor when these purchasers are induced to sign a contract of sale. These are all separate transactions taking place after interstate commerce has ceased, and necessary and incidental to the business of selling and renting the machines located entirely within the State and peculiarly under local control.

The statute in question, as we have shown, does not prohibit the sale in Virginia of goods shipped from another State, but has to do entirely with the carrying on of local businesses in that State. The goods have completed their interstate movement and a burden upon the sale of them after such transit is at an end, is not a regulation in the sense of the Constitution, and the right to sell goods which have come to rest in this State and are a part of the mass of property therein, is no defense to the failure to comply with the provisions of the statute in question before engaging in the business of such sales.

While, as has been repeatedly shown by the decisions of this court, it is not necessary for goods to have completely lost their interstate character after they have arrived at their destination and are held for sale in order for them to lose the protection of the commerce clause of the Federal Constitution so far as concerns local taxation, at the same time, it is of passing interest to note that the machines and other property sold by the plaintiff-in-error in Virginia, in its local or intrastate business, have entirely lost their interstate character because, after reaching the State of Virginia and before being sold, they are opened and taken out of the separate packages in which they were shipped, and exposed for sale, and even imposts under such circumstances are no longer protected by the Federal Constitution.

F. May & Co. v. *New Orleans*, 178 U. S. 496, 44 L. Ed. 1165 (1899).

American Steel & Wire Co. v. *Speed*, 192 U. S. 500, 522, 48 L. Ed. 538, 547 (1904).

It is unnecessary to discuss the closeness of the connection of the business of disposing of such machines with the interstate

commerce transactions of the plaintiff-in-error, as it is evident that the business which the State of Virginia claims to be a local or intrastate business is entirely separate from its interstate business or can be made so, and it is perfectly apparent that the interstate business can be easily carried on even though the plaintiff-in-error ceases to carry on the intrastate business, which the State of Virginia refuses to allow him to engage in without conforming with the statute in question. It has been shown that this local business composes a considerable amount, namely, one-third of the business which the plaintiff-in-error does in the State of Virginia, and it is not incidental to its interstate business but it is a definite, distinct, real, separate, and substantial business, as is clearly shown by the facts of the case. Were this not so, the burden of proof was on the plaintiff-in-eror to show that the domestic business is a mere incident to the interstate business.

Brown v. *Maryland*, ~~that is, sale in the original packages at~~

Nor does counsel for plaintiff-in-error even claim that these sales are incidental to the interstate business.

A sub-head of the brief of counsel for the plaintiff-in-error announces the proposition that "The test as to whether a business is interstate or intrastate is not the right of taxation for domestic purposes." Under this head, counsel do not present any argument or decisions to sustain the proposition, but admit that as soon as the machines of the plantiff-in-error have reached Virginia, they become subject to taxation by that State. We submit that they thus admit themselves out of court. Counsel contends under this head of their brief, that, though the machines have become so localized that the State may lay a tax on them, they still retain their interstate character for the purpose of sale, and quote from *Brown* v. *Houston*, *supra*, and *American Steel & Wire Co.* v. *Speed*, *supra*, neither of which cases sustain any such position.

We have hitherto pointed out the fallacy of this position, and it will be unnecessary to repeat what has already been said upon this subject.

The principle upon which goods that have arrived at their destination in this State, are subject to local taxes, is that such tax does not, as is said in *American Steel & Wire Co.* v. *Speed*, *supra*,

amount to a regulation of interstate commerce in the sense of the Constitution.

It is immaterial whether or not the test by which to determine the nature of business is the right to tax it, for we submit that, if the goods have so far lost their interstate character as that a tax on them will not be a regulation of the interstate commerce, then the tax on the business of dealing in such goods will not be a regulation of interstate commerce, and the plaintiff-in-error has no just cause of complaint before this court.

It has been pointed out repeatedly by this court that a tax on the business of selling goods is a tax upon the goods themselves, and we are at a loss to understand the logic of the contention that the goods may be taxed without violating the commerce clause of the Constitution, but that the business of selling those goods cannot be taxed when the result in each case is the same, namely: a tax upon the goods. No interstate movement follows a sale. The interstate movement has ended, therefore the goods may be taxed. No interstate movement succeeds the sale, therefore the business of selling the goods may be taxed. The business of selling under consideration, has no connection with interstate commerce in the sense of the Constitution. Thus, each case reviewed herein, and considering the question as to whether a State statute regulated interstate commerce, invokes the same principles and cites the same authorities to sustain the decision induced, whether the statute under review laid a tax on the property or on the business of selling the property, and whether it was a license tax or a permit tax as is the statute now under consideration.

Thus, the statute considered in *Howe Machine Co.* v. *Gage*, *supra*, was a license tax for selling the property; in *Brown* v. *Houston*, *supra*, a tax on the property; in *Emert* v. *Missouri*, *supra*, a license tax; in *American Steel & Wire Co.* v. *Speed*, *supra*, a general merchant's tax and a merchant's privilege tax; in *Pittsburgh, &c., Coal Co.* v. *Bates*, *supra*, an ad valorem tax; in *Kehrer* v. *Stewart*, *supra*, a license tax; in *Armour Packing Co.* v. *Lacy*, *supra*, a license tax; in *General Oil Co.* v. *Crain*, *supra*, an ad valorem tax, and, not to continue this enumeration unnecessarily, in *Baltic Mining Co.* v. *Massachusetts*, *supra*, a permit tax. In

this last case, the statute under review was very similar to the Virginia statute requiring foreign corporations to comply with certain conditions as a pre-requisite to doing business in this State.

In *Kehrer* v. *Stewart*, *supra*, this court sustained the position that the petitioner was doing a domestic business in Atlanta, Georgia, insofar as he was engaged in the business of selling direct to customers their goods that had previously been sent from Chicago and preserved for sale, citing *Brown* v. *Houston*, *supra*; *Emert* v. *Missouri*, *supra*, and *Howe Machine Co.* v. *Gage*, *supra*, to sustain the decision.

In *Armour Packing Co.* v. *Lacy*, *supra*, this court determined that the Armour Packing Company was doing a large business in the State of North Carolina, because it was selling products already stored there on orders received after these products were so stored.

Again, in *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430 (1894), *supra*, defendant's occupation was selling sewing machines in Missouri which had previously been sent there from New Jersey. The court, in determining whether or not he was engaged in interstate commerce or purely local business, said (p. 311 of U. S. Rep.):

> "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; *and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce.* The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, *the only goods in which he was dealing had become part of the mass of property within the State.* Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State." (Italics ours).

Judged by this rule, it cannot be doubted that plaintiff-in-error is doing a local business in Virginia.

(2) *In that it brings machines to Virginia and after they are at rest at their destination in that State they are rented wherever an acceptable lease can be found in the State.*

It has been shown that a great many machines are shipped to Virginia without any previous order therefor, and after they have come to rest in this State they are rented by the plaintiff-in-error to such persons as desire them. The plaintiff-in-error distributes these machines throughout the State, *still retaining title to them* and collecting a monthly rental for their use and does a substantial business in this State in that manner. After the interstate transit has ceased, after the machines are at rest in Virginia for sale, they are leased generally for a period of six months at a time and while this property is enjoying the protection of the State government, the plaintiff-in-error collects a monthly rent for the use of its property so located and after the lease has expired, the plaintiff-in-error again takes actual possession of it and sells or re-leases it to the same or a different lessee. We are at a loss to conceive what connection such transactions have with interstate commerce. We cannot believe this court will say that the State of Virginia cannot burden or regulate such a business, because some time in the past the property so rented came into the State of Virginia from the State of Ohio. We have discovered no decision of this court or any other court that ever hinted that such a business could invoke the protection of the Feneral Constitution on the ground that it was interstate commerce. On the other hand, the principles which are uniformly laid down in the decisions which we have reviewed above, clearly pronounce such a business as a purely local or intrastate business; as a business with which the Constitution of the United States is not concerned, and a business which is not even remotely connected with interstate commerce.

(3) *In that it engages in the business of repairing machines in Virginia.*

Not only does the plaintiff-in-error fulfill the guarantee it gives when it sells a machine by repairing the same for a year after the sale, but after the guarantee runs out, it enters into writ-

ten contracts to repair machines by the year (see Rec. p. 35, for form of machine service contract), and also repairs machines upon request even though it has not obligated itself to do so. In other words, the plaintiff-in-error is regularly engaged in the State of Virginia in the business of repairing for compensation machines which have become localized in that State and for this purpose it keeps a mechanic in Virginia who is regularly paid by the plaintiff-in-error. The maintenance of such a repair department in the State of Virginia, we submit, is purely intrastate business. Surely, it cannot be seriously contended that this is interstate business; that engaging in the repair business in Virginia is interstate business because the property repaired originally came from another State. There is absolutely no connection between this business and interstate commerce. The mere statement of the contention that because a machine was brought to Virginia from Ohio perhaps five, three, or even one year ago, the repairing of that machine for pay, is interstate business, is full of proof of its absurdity.

But, realizing that such a position cannot be maintained, the plaintiff-in-error claims that it could not sell its machines unless it arranged to repair them (brief of plaintiff-in-error, pp. 45, 49), and that it conducts a repairing business in the State of Virginia on that account.

Counsel for the plaintiff-in-error does not apprise the court upon what decisions or principle of law he relies to sustain the proposition that a business which is admittedly a purely local, domestic business, can be made to lose its character as such and become an interstate business, because it is necessary for it to do so in order to increase the sale of the product of the plaintiff-in-error.

If the fallacy of this position were not otherwise patent, it is made so by the further contention that this local business given an interstate character because it is necessary to increase the sales of the products of the plaintiff-in-error, retains that character even when it extends to repairing machines which have been sold and paid for.

But the plaintiff-in-error contends that repairing work was merely incidental to its interstate commerce, and cites cases of

Crutcher v. *Kentucky*, 141 U. S. 47, and *Kehrer* v. *Stewart*, 197 U. S. 66, to sustain its position. But we submit there is nothing in either of these cases to sustain this contention. In *Crutcher* v. *Kentucky*, 141 U. S. 56, *supra*, this court said (p. 56 of U. S. Rep.):

> " * * * The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the State law. And not only is a license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the State legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business: and that is a subject which belongs to the jurisdiction of the national and not the State legislature. * * *"

In regard to the contention that the fact that the company also did an intrastate business gave the State the right to burden its interstate business, the court used the language quoted in the brief of the plaintiff-in-error (brief, p. 46), and said:

> "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is, probably, quite as much for the accommodation of the people of the State as for the advantage of the company. *But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions to the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon*

that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.

"The case is entirely different from that of foreign corporations, seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall. 566; *Cooper Manufacturing Company* v. *Ferguson*, 113 U. S. 727; *Phil. Fire Association* v. *New York*, 119 U. S. 110." (Italics ours).

It is clearly seen that, in that case, this court only held that a State could not burden the interstate business of a company simply because it did also a local or intrastate business. This distinction would be clearly seen if counsel for the plaintiff-in-error had in his brief continued a little further his quotation from *Kehrer* v. *Stewart*, 197 U. S. 66, *supra*. In that case (*Kehrer* v. *Stewart*), it was held that so far as the plaintiff-in-error was engaged in the business of selling directly to customers in the State of Georgia, he was engaged in carrying on an intedependent and local business and referring to *Crutcher* v. *Kentucky*, the court said (p. 66 of U. S. Rep.):

"The case is readily distinguishable from that of *Crutcher* v. *Kentucky*, 141 U. S. 47, wherein a State law requiring a license from agencies of foreign express companies was held to be a regulation of interstate commerce, so far as applied to a corporation of another State engaged in interstate business, although as *incidental* thereto it did some local business by carrying goods from one point to another in the State of Kentucky. The court observed that while the local business was probably quite as much for the accommodaiton of the people of the State as for the advantage of the company, *this did not obviate the objection to the tax; that the*

regulations as to license and capital stock were imposed as conditions on the companies carrying on the business of interstate commerce, which was manifestly the principal object of its organization. 'These regulations are clearly a burden and a restriction upon the commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection'." (Italics ours).

We are unable to perceive the connection incidental or otherwise, between interstate sale of machines and a general repair business conducted after these machines are sold and delivered. *The repairs are rendered wholly within the State of Virginia and have no necessary relations to the interstate business of the plaintiff-in-error. It is subsequent to the interstate business and often contracted for independent of that business. New York* v. *Knight*, 192 U. S. 21, 27, 48 L. Ed. 325, 327 (1904).

Because a Michigan automobile manufacturer sells his machines in Virginia, it would hardly be contended that this fact gives him the right, under the commerce clause of the Federal Constitution, to open up, throughout that State, garages for the repair of automobiles, without complying with the laws of that State; but such a contention would be in all respects as sound as the contention in this case, that because the plaintiff-in-error sells in Virginia the machines made in Ohio, it has a right because of the commerce clause of the Federal Constitution, to engage in a machine repairing business in Virginia beyond the power of the State of Virginia to regulate or burden.

In *Osborne* v. *Florida*, 164 U. S. 650, 655, 41 L. Ed. 586, 588 (1897) this court said:

> "It has never been held, however, that when the business of the company which is wholly within the State is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. * * * "

This statement applies equally as well to the case at bar.

This very question was brought before this Honorable Court in *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed. 823 (1913). In that case a Missouri corporation shipped lightning rods to Georgia in consequence of orders previously obtained therefor. This transaction was necessarily recognized as an interstate transaction, but the contract under which the rods were shipped bound the seller as a part of the purchase price paid, to attach them at the seller's expense, to the houses of the persons ordering them. It was contended that carrying on the business of erecting lightning rods in Georgia *under these conditions*, was an incident to the interstate business of selling the rods, and, therefore, such business was interstate commerce beyond the power of the State of Georgia to regulate or directly burden. Mr. Chief Justice White, in delivering the opinion of the court, after reviewing the recent cases on the subject, which were relied upon to sustain the contention, said (p. 22 of U. S. Rep.):

> "We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed, was within the regulating power of the State and not the subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of State authority. (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true, that it was shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between National and State authority would become obliterated, since it would necessarily

follow that every kind or form of material shipped from one State to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce."

So, in this case, the repairing of machines is a strictly local business, peculiar within the exclusive control of State authority, and is wholly separate from interstate commerce, and involves no question of the delivery of property shipped in interstate commerce or of the right to complete the interstate commerce transaction, but concerns merely the doing of a local act after interstate commerce has completely terminated.

We submit that under these principles clearly set forth in the case of *Browning* v. *Waycross*, *supra*, the contention of the plaintiff-in-error that the repair business done by it in the State of Virginia, is an incident to and is interstate commerce, cannot be sustained.

Counsel for the plaintiff-in-error evidently are of the opinion that "incidental business," as applied to interstate commerce refers to the volume of business and the profits therefrom, as they attempt to sustain the incidental nature of the business by arguing that this department is a small part of the business transacted by the plaintiff-in-error in Virginia, and is maintained at a loss, but neither the amount of the intrastate business nor the ability to make a profit thereby is an *indicia* of its character. Whether the plaintiff-in-error does a large or small local business in Virginia, whether it conducts it at a loss or a profit, is a matter of no consequence because it is well-settled that a foreign corporation *can do no local business in Virginia* without the assent of that State.

In *Osborne* v. *Florida*, 164 U. S. 650, 41 L. Ed. 586 (1897), a license tax imposed upon express companies doing business in Florida, but construed as applying solely to the business of the company done within the State and not to its interstate business, was sustained, notwithstanding the fact that ninety-five per cent. of the business was interstate in its character and only five per cent. consisted of carrying goods and freight between points within the State of Florida.

In *Kehrer* v. *Stewart*, 197 U. S. 60, 68, 47 L. Ed. 663, 668 (1905) this court sustained a similar statute applying only to

the business done within the State. The court said that the record did not show what proportion of such business was interstate and what proportion was domestic, although it was conceded that most of the business was interstate in its character. The court further said that if a definite though a minor part of the business was carried on within the State, the payment of taxes could not be escaped since the greater or less magnitude of the business cuts no figure in the imposition of the tax. The Supreme Court of Appeals of Virginia in this case adopted as its opinion, the opinion of the distinguished Chairman of the Corporation Commission, who is now a member of the Supreme Court of that State, as follows (R. p. 86):

> "The test to determine whether a foreign corporation transacts such intrastate business as can be reached by State taxation is whether domestic business is substantial in its essence, and whether it may reasonably be separated from its interstate commerce; and the question does not depend upon a comparison of its intrastate with its interstate commerce.
>
> The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation, and is in other respects invulnerable, the mere fact that some foreign corporation may not be able to make profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business, subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources is the thing which is made the subject of the exercise."
>
> *Marconi Wireless Telegraph Co.* v. *Commonwealth*, 105 N. E. 314, 218 Mass. 566.
>
> *Baltic Mining Co.* v. *Mass.*, 231 U. S. 68, 58 L. Ed. 127."

(4) *In keeping on hand for sale and selling, as it were, "over the counter" in this State, supplies consisting of ribbons, rolls of paper, stamps and machines.*

What has heretofore been said applies with equal force here, and it is unnecesary to further discuss what is clearly a local business. The same excuses that were offered for conducting the businesses above-mentioned without complying with the Virginia

law, is offered in defense of conducting this business, and what is said there applies as well here.

Furthermore, counsel for the plaintiff-in-error contends that this business is carried on for the convenience of its customers, but a matter of convenience cannot so interlock a purely local business with interstate business as to make the two inseparable. Counsel for the plaintiff-in-error says that the insignificant sale of ribbons and rolls of paper, is insufficient to change the character of business from interstate to intrastate, but we submit that it would be more correct to say that because a local business is insignificant, this fact is not sufficient to change its character to interstate commerce, or to bring it within the protection of the Federal Constitution.

(5) *In that it sells machines not manufactured by it but taken as a part payment for its own machines.*

The plaintiff-in-error takes in exchange for its machines, the machines of other manufacturers and offers them for sale just as other local property is offered in Virginia, and sells these machines in this State. There is not even the most remote connection between the sale of these machines and interstate commerce. They are brought by the plaintiff-in-error into Virginia; they are offered for sale by it in Virginia; they are sold by it in Virginia. Just so long as the plaintiff-in-error has any connection or dealing with such machines, they are never outside of the borders of this State. Without further discussion, we submit that this statement of facts proves the local character of such transactions.

It is thus seen that the various methods of doing business which we have just enumerated, is not commerce between the States, that no interstate movement is caused by these various acts of the plaintiff-in-error: that all these various kinds of business are carried on after the movement of the property in interstate commerce has been accomplished. After they are at rest in the State, some of them are in the possession of its local representative: some of them are in the possession of persons whom they hope will buy them and to whom they have offered them for sale: some of them are in the possession of persons who have rented them, and some of them are in the possession of persons

who have bought and paid for them. In fact, the business of the plaintiff-in-error in the State of Virginia in the particulars above enumerated by Sub-sections 1, 2, 3, 4, and 5, is so far removed from interstate commerce as to have lost all vestige of such a character and before the same can be carried on by the plaintiff-in-error, it must comply with the requirements of the laws of the State, which is protecting it and its property while he is so engaged.

Where negotiations for the sale of property located in Virginia are begun and consummated in that State, the fact that the non-resident owner must approve the sales does not make the sale an interstate transaction.

Though plaintiff-in-error ships his machines to Virginia before sale and designates the price to be paid for them, and offers them for sale and allows its agent in that State to deliver them wherever he can find a purchaser or lessee, the title to the machines is retained by the plaintiff-in-error until such sale or lease is approved by it in Ohio. Even where a sale is for cash and the machine delivered, the transaction is not considered consummated or the title passed until an order for the machine so delivered is signed by the purchaser and sent to the plaintiff-in-error in Ohio. Even rental contracts are not binding until the contract is approved by the Company, though it is unnecessary in order to make the same a binding contract, for the notice of approval of a sale or rental, to be communicated to the purchaser nor endorsed up the duplicate order held by him. The machine is delivered to t purchaser or lessee from a stock on hand in Virginia, and he using the same, and the purchase price may perhaps have b paid in full before the order is even sent to the plaintiff-in-er but the title does not pass nor is the transaction considered fina ended until the order is in the hands of the plaintiff-in-error its approval.

Plaintiff-in-error claims that because of this fact, the tra action is an interstate transaction, and not subject to the laws Virginia. *Here is the gist of the issue in this case.* This necessary approval in Ohio is stressed throughout the evidence, assign-

ments of error and the argument of counsel for the plaintiff-in-error. One is met at every turn of the case by a declaration on the part of the plaintiff-in-error that the sale or lease is not consummated until its approval is given to the transaction.

We have purposely made no reference to this contention heretofore in our argument, as we have deemed it proper to first consider the case as if this peculiarity surrounding the business under review, did not exist. We confidently submit that, unless this necessary approval in Ohio changes the character of the business conducted by the plaintiff-in-error in Virginia and under review in this case, such business must be deemed a purely local business, subjecting plaintiff-in-error to the provisions of the statute in question. The question, therefore, naturally and pertinently arises: Does the business of plaintiff-in-error which would otherwise be a purely local and intrastate business have its character changed to an interstate business because it is necessary for the sanction of the plaintiff-in-error to be given in Ohio before the title of the goods sold passes? To properly determine the true answer to this question, it must be borne in mind that the sale of the goods is but the consummation of a series of events, all of which take place in Virginia. The goods are first brought into that State and offered for sale generally at the office of the agent in Richmond, Virginia, then the machines are usually deposited in the place of business of the prospective purchaser in Virginia for trial: after a trial, he agrees in Virginia to purchase, with the agent of the seller in Virginia, and signs an order in Virginia for the identical machine which is already in his possession in Virginia. This machine is then left with the purchaser—where it has been for some time previous—and one copy of the order is transmitted to the home office of the company for approval. All of these acts occur in the State of Virginia, and the only act which has the semblance of drawing another State into the transaction, is the transmitting to the home office of the plaintiff-in-error in Ohio, for approv al,the order which has been signed and upon which the purchaser has already been possessed of the machine. We cannot believe that such a transaction constitutes "commerce among the several States," that the bare necessity of sending an order for machines already delivered and after the trans-

action is practically completed, to another State, can change the whole character of the transaction so as to make what would otherwise be a clear and purely local and intrastate transaction, an interstate transaction protected by the commerce clause of the United States.

The character of the transaction surely cannot depend solely on when or where the title technically passed. The question as to whether a certain series of transactions constitute interstate commerce cannot always be decided by determining the place where the contract was made nor where the title passed. As was said by Mr. Justice Holmes in *Dozier* v. *Alabama*, 218 U. S. 124, 128, 54 L. Ed. 965 (1909), *supra*:

> " * * * But, as was hinted in *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512, what is commerce among the States is a question depending upon broader considerations that the existence of a technically binding contract, or the time and place where the title passed. * * * "

In *Rearick* v. *Pennsylvania*, 203 U. S. 507, 51 L. Ed. 295 (1906) this court, in delivering the opinion through Mr. Justice Holmes, in discussing the question of title as decisive of the character of commerce, said (p. 512 of U. S. Rep.):

> " 'Commerce among the several States' is a practical conception not drawn from the 'witty diversities' (Yelv., 33) of the law of sales. *Swift & Co.* v. *United States*, 196 U. S. 375, 398, 399. The brooms were specifically appropriated to specific contracts, in a practical, if not in a technical, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce. In *Brennan* v. *Titusville*, 153 U. S. 289, pictures were sold by sample, as the brooms were here, and although the pictures were consigned to the purchasers directly, the railroad collecting the price, there was no discussion of the question whether the title had passed. In *American Express Co.* v. *Iowa*, 196 U. S. 133, 143, that question was referred to only to be waived. In *Caldwell* v. *North Carolina*, 187 U. S. 622, the pictures were consigned to the defendant, an agent, as here, with the additional facts that the pictures and frames were sent in large packages, which were opened by the agent

on their arrival, and that the pictures, then for the first time, were put into their proper frames, and, for all that appears, then for the first time appropriated to specific purchasers. In the court below all the judges agreed that the title did not pass until delivery. 127 N. Car. 521, 526, 527. This court intimated nothing to the contrary. * * * "

In *N. & W. Rwy. Co.* v. *Sims*, 191 U. S. 441, 48 L. Ed. 254 (1903), goods were shipped from Illinois to North Carolina in response to a specific order under an ordinary C. O. D. consignment, and it was contended that as the title did not pass until delivery of the goods and the payment of the price, all of which took place in North Carolina, it was an intrastate transaction. The court said (p. 447 of U. S. Rep.):

> "While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet as matter of fact the bargain is made and the *contract of sale completed as such, when the order is received in Chicago*, and the machine shipped in pursuance thereof." (Italics ours).

Mr. Justice Brown, who delivered the opinion of the court, in closing, said (p. 451 of U. S. Rep.):

> " * * * While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce."

We submit that, in the case at bar, while technically the title to the machines may not pass until the orders reach the city of Cincinnati, the sales are actually made in Virginia; the possession of the property is passed and the money is collected in Virginia, and the fact that the order for the property which has already been delivered has to be sent to the State of Ohio after delivery, is too slender a thread upon which to hang an exception of this transaction from a rule which would otherwise declare it to be local or intrastate business.

It is true that these cases dealt with the question as to whether the mere passing of title could change a clearly interstate transaction to an intrastate transaction. But we submit that the principle governing is the same when it is attempted to change a clearly intrastate transaction to an interstate transaction by a mere matter of the technical passing of the title.

In the case of *Browning* v. *Waycross*, 233 U. S. 16, 58 L. Ed.- 828 (1914) Mr. Chief Justice White, who delivered the opinion of the court (p. 23 of U. S. Rep.) said that "It was not within the power of the parties by the form of their contract, to convert what was exclusively a local business subject to State control, into an interstate commerce business protected by the commerce clause," and we believe that this is a conclusive answer to the position of the plaintiff-in-error that the fact that it requires orders for machines already sold to be returned to Cincinnati for approval, makes an exclusively local business an interstate commerce business.

This is evidently a practical age and no fine spun theories will be allowed by this court to interfere to enable corporations who carry on a strictly local business within a State, to escape from complying with the laws of such a State. Commerce between the States is a practical, not a technical conception. *Davis* v. *Virginia*, 236 U. S. 697, 698 (1915). We submit, therefore, that from the expressions of this court on the subject, it must be concluded that the mere passing of title cannot determine the character of a transacton, so far as concerns the commerce clause of the Federal Constitution.

Much has been said by counsel for the plaintiff-in-error about transactions "between citizens of different States." If the fact that the transaction was had between citizens of different States made such transaction interstate commerce, then every non-resident who is daily selling goods over the counter in Virginia to citizens of that State, is engaged in interstate commerce and protected from contributing to the government of that State, under whose protection it is doing business.

We think a complete answer to this contention is contained in the opinion of the Chairman of the Corporation Commission of the State of Virginia (adopted by the Supreme Court of Appeals of Virginia as its opinion) when he said (R. p. 82):

"A number of quotations from decisions are made to the effect that interstate commerce consists of transactions between 'citizens of different States,' and great emphasis is laid upon this precise language. We think, however, that the decisions do not justify this emphasis, and that no case can be found in which the character of the commerce is made to depend upon the citizenship of the parties or the place of final ratification of the contract. The true test is, not the citizenship of the parties, but the essential character of the transaction. In this case counsel seem to be conscious of this doctrine, and so has introduced a new term, and calls the transaction an 'interstate contract,' apparently concluding that if the contract be 'interstate' the commerce is interstate. In this connection he said: 'This distinguishes this case from the other cases that we have been able to find in the Supreme and Circuit Courts, and serves, as we think, to stamp the transactions of the defendant with the characteristics and indicia of interstate business, protected by the commerce clause of the Constitution.'

This is the gist of the contention here, and the defendant's case depends upon the ability to establish this proposition.

If it be true that because, at some stage of a commercial transaction, it is necessary to have the approval of the seller, who is a citizen of a different State and located in that other State at the time the contract is said to be completed, therefore the transaction is interstate commerce, then a discovery has been made and a new and large class of commercial transactions which are in essential character intrastate commerce will be protected by the commerce clause of the Constitution. The seller of goods by retail may establish his place of business in one State and his residence in another, and by requiring that all transactions shall be subject to his approval in the State of his residence may escape all local license and privilege taxes.

An ineffectual effort to escape State local taxes by requiring the contract to be approved at the home office seems to have been made by the Singer Sewing Machine Company in Alabama. *Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 58 L. Ed. 974. That case differs from this in some vital particulars but in that particular it is identical."

As is said by Kelly, J., in delivering the opinion of the Supreme Court of Appeals of Virginia (R. p. 88):

"The first impression obtained from reading the record is that the company's purpose has been to avoid, not to say evade, the license tax provided for by Section 1104 of the Code; and, upon a more mature consideration this impression becomes a conviction that the method of transacting a substantial part of the business in question is, as found by the Corporation Commission, 'a mere device for the purpose of avoiding the State statutes'."

But whatever the purpose of the plaintiff-in-error, we submit that the requirement that all orders for the purchase of its property be sent to Ohio before the sale of the same is considered consummated, does not change the character of its business in Virginia from a local business to an interstate business; that, from the expressions of this court on the subject, it must be concluded that the real character of the transacton and not the technical question of where title passed or whether the transaction was between citizens of different States, is the test to determine whether such transaction is local or interstate business. *Applying this test, the business now under consideration must be determined to be a purely local or intrastate business.*

Counsel for plaintiff-in-error on this question seem to rely on the case of *Holder* v. *Aultman*, 169 U. S. 81, 42 L. Ed. 669 (1897). In that case, Aultman, Miller & Company, a corporation of the State of Ohio, brought suit in the Circuit Court of the United States for the Eastern District of Michigan, against William Holder, a citizen of the State of Michigan, to recover the price of agricultural machines furnished by the plaintiff to the defendant and sold by the defendant to parties in Michigan under a contract between the plaintiff and the defendant, which provides on its face that the contract was not valid unless countersigned by the manager of the corporation at Lansing, Michigan, and approved in the home office in Akron, Ohio. The defendant relied on a statute of Michigan requiring foreign corporations to file and record their articles of association and pay a State franchise fee before being permitted to do business in the State. The statute provided that all contracts *made in the State* after the first day of January, 1894, by any corporation which had not first complied with the provisions of the Act, should be wholly void.

The defendant contended that the contract was made in Michigan by the plaintiff, a corporation which had not complied with the Act, and therefore, the contract was void and could not be sued on in Michigan. The Circuit Court held that the contract was made in Ohio and that the statute of Michigan, so far as it applied to business carried on by the plaintiff in that State, under asid contract, was void because it was in conflict with the commerce clause of the Federal Constitution. This court, however, held (p. 89 of U. S. Rep.) that it was not necessary to pass upon the constitutional question, saying, through Mr. Justice Gray:

> "But this court has not found it necessary to pass upon the constitutional question, because it is of the opinion that the contract is not within the statute set up by the defendant.
>
> By the clear terms of the statute of Michigan, the invalidity of the contract does not depend upon the place where, or the time when, it is to be performed, but upon its being 'made in this State after January 1, 1894.' A contract made before that date is valid, although it is to be performed afterwards; and a contract made elsewhere than in Michigan is valid, although it is to be performed in this State.
>
> A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both."

It will be noted, therefore, that this case differs from the case at bar in several particulars. *First*, in *Holder* v. *Aultman*, *supra*, the machines which were to be sold *were in Ohio* when the contract was signed and *their interstate movement followed* the ratification of the contract at Akron, Ohio. Second, *Holder* v. *Aultman*, *supra*, is not a case of the sale of goods but simply a contract by which a corporation agreed to furnish machines to a person in another State who was to sell them upon certain terms, *third*, the court specifically refused to pass upon the very question which is involved in the case at bar, simply holding that under the terms of contract, it would not apply to such a contract as the one set out in that case, because the statute referred to contracts "*made in Michigan*," and the contract in question was not "*made in Michigan*." Fourth, the question in the case at bar is not where the contract was technically completed, but the character of the business of selling machines already located in Vir-

ginia, and this character is not determined, as we have shown, by the time and place where the title technically passed.

THE DECISION OF THE SUPREME COURT OF APPEALS OF VIRGINIA.

We do not deem it necessary to reply to the detailed consideration of the decision of the Supreme Court of Appeals of Virginia made by counsel for the plaintiff-in-error, from pages 58 to 74. It only reiterates the position taken by counsel for the plaintiff-in-error in what precedes that consideration and contains no principle which has not already been discussed at length in this brief.

But under this head, counsel attempts to distinguish between the case at bar and the case of *Browning* v. *Waycross*, *supra*; *Kehrer* v. *Stewart*, *supra*, and *Armour Packing Co.* v. *Lacy*, *supra*, but it is a distinction without a difference. We have shown that the fact that all orders must be returned to Ohio for approval did not change the character of the transaction. Leaving, therefore, this fact out of consideration, the only distinction which counsel for plaintiff-in-error makes between the case of *Browning* v. *Waycross*, *supra*, and the case at bar (R. p. 68)) is that in the first case the business was erecting lightning rods, while in the case at bar the business is selling machines.

Counsel for plaintiff-in-error attempts to distinguish between the case of *Kehrer* v. *Stewart*, *supra*, (R. p. 72) and the case at bar by showing that in that case there was a place of business in Virginia, while in the case at bar, there was no place of business but only the place of business of an agent. The immateriality of this difference is so manifest as not to need comment thereon.

As to the case of *Armour Packing Co.* v. *Lacy*, *supra*, counsel says (Brief p. 73):

> "If the Virginia statute simply imposed a tax on everybody selling adding machines in the State of Virginia, so as to include those which were manufactured and sold there, as well as others, instead of on foreign corporations only, it would present an entirely different question—one parallel to that involved in *Armour* v. *Lacy*—but no such condition exists in this case."

As no question of discrimination has or could be raised in this case, we think that the statement above quoted is clear proof that counsel for plaintiff-in-error are "hard put" to find any distinction between that case and the case at bar, and we do not think it necessary to further answer such an attempted distinction than to say, that the statement itself is its best answer.

Counsel concludes by saying that the whole question is whether a shipment may precede a sale or must succeed it. We submit that the whole question is whether or not the plaintiff-in-error may ship its property to the State of Virginia, without any previous orders therefor; place it on exhibition for sale in that State; hold it here until it secures a prospective purchaser; distribute its machines among such purchaser throughout that State and after leaving them for trial sell them or lease them; continue to repair them at a proper charge indefinitely and to furnish them the different parts to, and accessories, for the machines, take in exchange for its machines, machines of other makes and sell these last named machines wherever they can secure a purchaser, not one of which transaction causes an interstate movement, and all of which takes place in Virginia, and yet claim that it is only doing interstate business in Virginia.

We conclude in the words of Mr. Justice Harlan, in delivering the opinion in *Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. Ed. 223 (1894) who, at page 479 of U. S. Rep., said:

> "* * * * But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union,' *the judiciary of the United States should not strike down a legislative enactment of a State*—especially if it has direct connection with the social order, the health, and the morals of its people—*unless such legislation plainly and palpably violates some right granted or secured by the national Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.*" (Italics ours).

For these reasons and for the clear and succinct reasons given by the Supreme Court of Appeals of Virginia, in its opinion in this case (R. pp. 88 to 95, inclusive), we respectfully submit that the judgment of the Supreme Court of Appeals of Virginia, is correct and should be affirmed.

Respectfully submitted,

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Attorney General of Virginia.